Central Law Journal.

ST. LOUIS, MO., SEPTEMBER, 7, 1900.

A case recently decided by the United States District Court for the Northern District of New York—*In re* Quackenbush—is an apt illustration of what acts will amount to concealment of assets which will prevent discharge from bankruptcy. It appeared there that the bankrupt, prior to the passage of the bankruptcy law, fraudulently transferred his real and personal property to his wife, in order that he might prevent its seizure by his creditors. Ever since the transfer he had continued to enjoy the rents and profits of such property, and, although nominally the legal title is in his wife, the property has been under his dominion and control. After the passage of the bankruptcy law the bankrupt instituted voluntary proceedings to become a bankrupt, and sought to obtain his discharge. It was held that the bankrupt's persistent use of the fraudulent transfers since the passage of the bankruptcy law as a cover for his ownership of the property amounted to a continous concealment of such property, and that his discharge should be refused.

An ordinance of the City of New Orleans prescribing limits in a city outside of which no woman of lewd character shall dwell, has recently been declared by the Supreme Court of the United States as an exercise of the police power which does not invade the rights of property owners in or adjacent to the prescribed limits, in violation of the federal constitution, although the pecuniary value of their property may be depreciated in consequence thereof. L'Hote v. New Orleans, 20 S. Ct. Rep. 788. The court, in summarizing up its conclusion, says that "obviously the regulation of houses of ill fame, legislation in respect to women of loose character, may involve one of three possibilities: First, absolute prohibition; second, full freedom in respect to place, coupled with rules of conduct; or, third, a restriction of the location of such houses to certain defined limits. Whatever course of conduct the legislature may adopt it is in a general way conclusive upon all courts, State or federal. It is no part of the judicial function to determine the wisdom or folly of a regulation by the legislative body in respect to matters of a police nature.

Now, this ordinauce neither prohibits absolutely nor gives entire freedom to the vocation of these women. It attempts to confine their domicile, their lives, to certain territorial limits. Upon what ground shall it be adjudged that such restriction is unjustifiable; that it is an unwarranted exercise of the police power? Is the power to control and regulate limited only as to the matter of territory? May that not be one of the wisest and safest methods of dealing with the problem? At any rate, can the power to so regulate be denied? But given the power to limit the vocation of these persons to certain localities, and no one can question the legality of the location. The power to prescribe a limitation carries with it the power to discriminate against one citizen and in favor of another. Some must suffer by the establishment of any territorial boundaries. We do not question what is so earnestly said by counsel for plaintiffs in error in respect to the disagreeable results from the neighborhood of such houses and people; but if the power to prescribe territorial limits exists, the courts cannot say that the limits shall be other than those the legislative body prescribes. If these limits hurt the present plaintiffs in error, other limits would hurt others."

Among the cases in which this question has been presented are Northwestern Fertilizing Co.v. Hyde Park, 97 U. S. 659, and Mugler v. Kansas, 123 U. S. 623. In the first mentioned an act of the legislature of Illinois had authorized a fertilizing company to establish a plant for the purpose of converting dead animals into an agricultural fertilizer. In pursuance of this authority the company had built its factory outside the then limits of the city of Chicago and in a territory adjacent to which there was no population. As the years rolled by population gathered around the factory, and the character of the work carried on was such as to make it a nuisance to the neighborhood. The village of Hyde Park, which had grown up around the works of the company, passed an ordinance to suppress these works, and a

bill was filed in the State court to restrain the enforcement of that ordinance. The supreme court of the State held the ordinance valid, and on error to the United States Supreme Court that judgment was affirmed. Although there was a charter right to maintain these works, and although when established they were located in a territory in which there was no population, yet when population had gathered around them the police power of the State was held sufficient to stop their existence, and that without compensation to the owner. The pecuniary injury which directly resulted to the company from the stoppage of its works was held no bar to the police power of the State. In the other case, Mugler had established a brewery in Kansas, when such an institution was authorized by the laws of the State. The buildings and machinery were of little value, except for the purpose of manufacturing beer. Yet when Kansas, in the exercise of its police power, determined that the manufacture of beer should cease, it was ruled by this court that the pecuniary loss to Mugler did not justify any restraint of the legislative acts prohibiting the manufacture of beer. Each individual holds his property subject to the ordinary and reasonable exercise of the police power, and the fact that its exercise may in a particular case work pecuniary injury was adjudged insufficient to stay the legislative action. It is true those cases involved pecuniary injury to the persons whose action was prohibited, but it cannot be that the police power of a State can be stayed because it works injury to one person, and not stayed if it works injury to another.

NOTES OF IMPORTANT DECISIONS.

NEGLIGENCE — PROXIMATE CAUSE — VIOLATION OF SUNDAY LAW.—The Supreme Court of Kansas decides in City of Kansas City v. Orr, 61 Pac. Rep. 397, that the fact that one who sustains injury by reason of the negligence or wrongful act of another may have been at the time of the injury acting in disobedience of his collateral obligation to the State which required of him the observance of the Sunday law, will not prevent a recovery from one whose wrongful or negligent act or omission was the proximate cause of the injury. The following is from the opinion of the court:

"An objection is made to a recovery because of an alleged violation of the Sunday law. The accident occurred on Sunday morning. The statute forbids all labor on that day, except works of necessity and charity. Orr was at work as a switchman, and assisting in the operation of a railway train, when he was injured and killed; and the city, assuming the position of a champion of the Sunday law, insists that it is not liable for its own negligent acts, because Orr was a transgressor of the law. The operation of a railway train or other public conveyance may be a work of necessity, and there is nothing in the record to show that the operation of the train on this occasion was not a work of necessity. Aside from that consideration, the violation of the Sunday law, if in fact it was violated, was not the efficient or proximate cause of the injury to the plaintiff, nor an essential element of her cause of action. The general rule is that a plaintiff will not be permitted to recover when it is necessary for him to prove his own illegal act or contract, as a part of his cause of action; but the time when the injury occurred does not constitute the foundation of the action, and plaintiff could prove her cause of action without proving that her husband was violating the law when the injury occurred. The time when the injury was inflicted is only an incident to the efficient cause of the injury. The injury occurred by reason of the defect in the street, and was as liable to have occurred under similar circumstances on Saturday or Monday as it did on Sunday. There was not even a remote relation between the violation of the Sunday law and the injury which resulted from the negligence of the city in maintaining its streets in a proper condition. In Railway Co. v. Frawley, 110 Ind. 30, 9 N. E. Rep. 600, it is said that 'the fact, that one who sustains injury by the negligent or wrongful act of another may have been at the time of the injury acting in disobedience of his collateral obligation to the State, which required of him the observance of the Sunday laws, will not prevent a recovery from one whose wrongful or negligent act or omission was the proximate cause of said injury.' See, also, Sutton v. Town of Wauwatosa, 29 Wis. 21; Railway Co. v. Buck (Ind. Sup.), 19 N. E. Rep. 453, 2 L. R. A. 520; Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co., 23 How. 207, 14 L. Ed. 433; Mohney v. Cook, 26 Pa. St. 342; Baldwin v. Barney, 12 R. I. 392; Merritt v. Earle, 29 N. Y. 115; Carroll v. Railroad Co., 58 N. Y. 126; Platz v. City of Cohoes, 89 N. Y. 219; Schmid v. Humphrey, 48 Iowa, 652; Opsahl v. Judd, 30 Minn. 126, 14 N. W. Rep. 575; Railroad Co. v. Dick (Ky.), 15 S. W. Rep. 665; Black v. City of Lewiston (Idaho), 13 Pac. Rep. 80; Gross v. Miller, 93 Iowa, 72, 61 N. W. Rep. 385, 26 L. R. A. 605; Solarz v. Railway Co. (Super. N. Y.), 29 N. Y. Supp. 1123; Stewart v. Davis, 31 Ark. 518; Van Auken v. Railway Co. (Mich.), 55 N. W. Rep. 971; Patt. Ry. Acc. Law, 64; Cooley, Torts, 178; Whart. Neg. § 331, Beach, Contrib. Neg. § 81.

It is true that some of the New England courts hold to a contrary view, but such holding is against reason and the great weight of authority."

CORPORATION—LIABILITY OF STOCKHOLDERS—PAYMENT FOR STOCK IN PROPERTY.—In State Trust Co. v. Turner, 82 N. W. Rep. 1029, it is held by the Supreme Court of Iowa that where property is received by a corporation at a speculative and excessive valuation in payment for shares of its stock it is only a payment to the extent of the property received, and the original owner of such stock is liable to creditors for the difference between the true value of the property and the face value of the stock; and that where a payee takes a note from a corporation with knowledge that its stock was exchanged for property at an excessive valuation, his assignee, after maturity, who has secured judgment on the note, against the corporation, cannot recover on such judgment against an owner of the stock, since such assignee has no greater rights against such owner than his assignor had. The court said in part:

"Involved primarily is the so-called 'trust fund doctrine,' as applied to stockholders' obligations to creditors. This is founded on the proposition that as the State undertakes to relieve the stockholders in a corporation of general liability for the debts of the concern, to the amount that he has invested in the enterprise, he ought, in good faith, to pay in money or its equivalent the face value of the stock received; and if he fails to do this, he should be treated as holding the remainder in trust for the benefit of the creditors of the corporation. From this proposition two apparently conflicting and inconsistent rules have grown up, one of which may be called the 'true-value rule,' and the other the 'good-faith rule.' Courts adopting the good-faith rule are also divided on the proposition as to what is necessary to be shown to constitute good faith. Some of them hold that, in the absence of an affirmative showing of fraud *altunde*, mere overvaluation of the property given in exchange for stock will not render the stock liable for the difference, while others hold that overvaluation itself, especially if gross, constitutes, or at least raises a strong presumption of, fraud. The development of the trust-fund doctrine may be gathered from a reading of the following: Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944; Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731; Handley v. Stutz, 139 U. S. 427, 11 Sup. Ct. Rep. 530, 35 L. Ed. 227, and cases cited therein; Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. Rep. 127, 37 L. Ed. 1113; Osgood v. King, 42 Iowa, 478. Cases holding to the true-value doctrine are as follows: Van Cleve v. Berkey, 143 Mo. 109, 44 S. W. Rep. 743, 42 L. R. A. 593; Joseph v. Davis (Ala.), 10 South. Rep. 830; Gates v. Stone Co., 57 Ohio St. 60, 48 N. E. Rep. 285; Haldeman v. Ainslie, 82 Ky. 395; Libby v. Tobey, 82 Me. 397, 19 Atl. Rep. 904; Elyton Land Co. v. Birmingham Warehouse and Elevator Co., 92 Ala. 407, 9 South. Rep. 129, 12 L. R. A. 307; Clayton v. Knob Co., 109 N. Car. 385, 14 S. E. Rep. 36; Gogebic Inv. Co. v. Iron Chief Min. Co., 78 Wis. 427, 47 N. W. Rep. 726. Some of those holding to the first division of the good-faith rule are Smith v. Prior, 58 Minn. 247, 59 N. W. Rep. 1016; Schenck v. Andrews, 57 N. Y. 147; Van Cott v. Van Brunt, 82 N. Y. 535; Graves v. Brooks (Mich.), 75 N. W. Rep. 932; Colt v. Amalgamating Co., 119 U. S. 343, 7 Sup. Ct. Rep. 231, 30 L. Ed. 420; Kelley v. Fletcher, 94 Tenn. 1, 28 S. W. Rep. 1099; Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co., 43 U. S. App. 452, 23 C. C. A. 302, 75 Fed. Rep. 554; Phelan v. Hazard, 5 Dill. 45, Fed. Cas. No. 11,068; New Haven Horse-Nail Co. v. Linden Springs Co., 142 Mass. 349, 7 N. E. Rep. 773. And of those holding to the second division are Douglas v. Ireland, 73 N. Y. 104; Boynton v. Andrews, 63 N. Y. 96; Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 67 N. W. Rep. 652; Kelly v. Mining Co. (Mont.), 53 Pac. Rep. 959, 42 L. R. A. 621; Lloyd v. Preston, 146 U. S. 630, 13 Sup. Ct. Rep. 131, 36 L. Ed. 1111; Wallace v. Manufacturing Co. (Minn.), 73 N. W. Rep. 189. It will be noticed that there is some confusion in the New York and United States Supreme Court cases, and it is difficult to say just what rule prevails in Illinois. See Sprague v. Bank, 172 Ill. 149, 50 N. E. Rep. 19, 42 L. R. A. 606. But the supreme court has never departed from the principles of Sawyer v. Hoag, and other like cases. See Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. Rep. 585, 36 L. Ed. 363. Nothing further need be said regarding the attitude of the various courts of the country on these propositions. Some of the cases cited may not clearly fall to the places assigned them, but, on the whole, we think this as fair a classification of the authorities as can be made. In view of our previous holdings, this discussion may seem unnecessary; but, as counsel seem to think that the question is new to this court, we have attempted to state in brief some of the holdings in other jurisdictions.

"We think our previous cases adopt the true-value rule,—perhaps not to its full extent; but such has been the drift of these cases. In Osgood v. King, 42 Iowa, 478, we said: 'Every principle of honesty and justice demands that, as between the stockholder and the creditor, the stock shall be considered paid only to the extent of the fair value of the property conveyed, and that for the balance the stockholder shall be held individually liable.' In Jackson v. Traer, 64 Iowa, 477, 20 N. W. Rep. 767, quoting from Taylor on Corporations, we said: 'If the property secured is grossly unequal in value to the par value of the shares, the subscriber who secured the shares originally, or his subsequent transferee with notice of the circumstances, may be compelled to make up the difference in value.' In Chisholm v. Forny, 65 Iowa, 333, 21 N. W. Rep. 664, Seevers, J., speaking for the court, said: 'Persons dealing with the corporation had the right to assume that it owned

valuable assets to the amount of its capital stock; that is to say, that, in consideration for the stock issued, the corporation had received money or property which would be available to pay an indebtedness incurred in its business. A patent is, as has been said, a property in a notion, and has no corporeal, tangible substance, and cannot be levied on and sold under execution issuing from State courts; and whether it can be sold on executions issuing from the federal courts is regarded as doubtful. Until its usefulness has been established, the value of a patent right is purely speculative.' Judge Robinson, in Withard v. Hansen, 99 Iowa, 307, 68 N. W. Rep. 691, uses this language: 'Where the capital stock of a corporation is issued to one of its promoters and organizers for property which is taken at a gross overvaluation, the transaction is fraudulent against creditors of the corporation, if it be insolvent; and the stockholder who receives such stock with knowledge * * * will be liable to creditors on the stock he holds for the difference between the par value * * * and the amount actually paid.' In Stout v. Hubbell, 104 Iowa, 499, 73 N. W. Rep. 1060, it is said: 'It is alleged * * * that the land was given and received under an agreement that it was a full payment for the stock. This would, alone, be no defense; for this court has held, as to creditors of a corporation, that, when property is received by the corporation at an excessive valuation in payment for shares of its capital stock, it is only a payment to the extent of the value of the property received, and the owner of such stock is liable to creditors for the difference between the actual value of the property and the face value of the stock.' In Carbon Co. v. Mills, 78 Iowa, 465, 43 N. W. Rep. 290, 5 L. R. A. 649, we again quoted with approval the rule announced by Mr. Taylor in his work on Corporations, and said that no plea of fraud was necessary. From this review it is apparent that we have, in effect, adopted the true-value rule, although saying in some cases that the reason for so doing was to prevent fraud. There is nothing in these decisions or in the statutes that inhibits the taking of property in exchange for stock, providing it is taken at its true value; and this value we do not think should in all instances, if in any, be measured by results. The parties have the right in good faith to agree on the value of the property taken, but this should not be a speculative or fictitious one. An honest mistake in judgment will not necessarily destroy the value agreed upon, but it must be such a valuation as prudent and sensible business men would approve. Values based on visionary or speculative hopes, unwarranted by existing conditions or facts and without reasonable evidence from present appearances, are not such as the law will tolerate, as against creditors. It is apparent that the patent and property sold the corporation by Porter *et al.* had no such value as the parties placed upon it. The valuation was wholly speculative, visionary, and imaginary, as experience has shown. Indeed, we doubt if the parties thought it had any such value as they fixed upon it. They say they hoped and believed the company would realize therefor and thereon more than $90,000, but no one had the temerity to say that he regarded the patent and property as of that value. The actual value received was but little over $500.

"But it is said that, as plaintiff's assignor had full knowledge and notice of all the facts, plaintiff cannot recover. This contention requires a little further examination of the *rationale* of the trust-fund doctrine. Consideration of the cases will show that it grew out of a desire on the part of courts to protect creditors who invested their funds on the faith that the capital stock was fully paid up, and represented the true assets of the corporation. Mr. Justice Miller, in Sawyer v. Hoag, *supra*, said: 'We think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation.' He further said: 'It is thought but just that when the interests of the people or of strangers dealing with this corporation are to be affected by any transaction between the stockholders who own the corporation, and the corporation itself, such transaction should be subject to rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed, intentionally and inequitably, to screen the stockholders from loss, at the expense of the general creditors, it should be disregarded or annulled so far as it may inequitably affect him.' In Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203, this rule is announced: 'The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. * * * The capital stock paid in and promised to be paid in, is a fund which the trustees cannot squander or give away.' Justice Woods, in Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968, says: 'The reason is that the stock subscribed is considered in equity as a trust fund for the payment of creditors. It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor, therefore, has the right to presume that the stock subscribed has been or will be paid up; and, if it is not, a court of equity will, at his instance, require it to be paid.' In further explanation of the doctrine, Justice Brewer, speaking for the court in Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. Rep. 127, 37 L. Ed. 1113, said: 'Yet all that is meant by such expressions ("trust fund") is the existence of an equitable right, which will be enforced whenever a court of equity, at the instance of a proper party, etc., has taken possession of its assets. It is never understood that there is a specific lien or a direct trust.' Quoting from Pomeroy's Equity, he further says: 'They are not in any true and complete sense trusts, and can only be called

so by way of analogy or metaphor.' He further likens a creditor's rights in such a case to the rights of a creditor of a partnership. Justice Field, in Fogg v. Blair, 133 U. S. 534, 10 Sup. Ct. Rep. 338, 33 L. Ed. 721, also announced a similar doctrine. Justice Woods, in Scovill v. Thayer, gives some of the reasons for the rule; and he says, in substance, that if a corporation sells its stock, as fully paid, for a discount, it cannot thereafter make calls for the purpose of increasing its business. 'The shares were issued as full paid on a fair understanding, and that bound the company. * * * But the doctrine of this court is that such a contract, though binding on the company, is a fraud, in law, on its creditors, which they could set aside; that when their rights intervene, and to satisfy their claims, the stockholders could be required to pay their stock in full.' Following this doctrine to its logical conclusion, it was held in Bank v. Alden, 129 U. S. 372, 9 Sup. Ct. Rep. 332, 32 L. Ed. 725, that, where the creditor has full knowledge of the transaction between the corporation and its stockholder at the time he extends credit, he cannot be heard to complain, for the reason that no credit is given upon a representation of a different set of facts than those which actually existed. See, also, Coit v. Amalgamating Co., 179 U. S. 343, 7 Sup. Ct. Rep. 231, 30 L. Ed. 420; Walburn v. Chenault (Kan. Sup.), 23 Pac. Rep. 657; Whitehill v. Jacobs (Wis.), 44 N. W. Rep. 630; Young v. Iron Co., 65 Mich. 111, 31 N. W. Rep. 814; Woolfolk v. January (Mo. Sup.), 33 S. W. Rep. 432; Manufacturing Co. v. Wallace (Wash.), 48 Pac. Rep. 415; Robinson v. Bidwell, 22 Cal. 379; First Nat. Bank of Deadwood v. Gustin Minerva Con. Min. Co. (Minn.), 44 N. W. Rep. 198, 6 L. R. A. 676. Indeed, we find no case to the contrary, unless it be Sprague v. Bank, 172 Ill. 149, 50 N. E. Rep. 19, 42 L. R. A. 606. That decision was based on a statute, however, which is somewhat different from ours, in that it made each stockholder liable for the debts of the corporation to the extent of the amount that may be unpaid on the stock held by him. Our statute says that nothing in the chapter contained, and nothing in the articles of incorporation, shall relieve the stockholders from individual liability, etc. (Code, § 1631), leaving the liability to be determined under the general law. Light Co. v. Child (Conn.), 37 Atl. Rep. 391, relied on by appellant, is not in point."

LIABILITY OF MUNICIPAL CORPORATIONS FOR DAMAGES RESULTING FROM DEFECTIVE PLANS OF CONSTRUCTION.

Sec. 1. *General Doctrine Stated.*—The adjudications seem to fully support the general proposition that a municipal corporation is liable in damages caused by the construction of public work in pursuance of a plan prescribed by ordinance only when the injury is the result of negligence in the execution of the plan, and not when it is the result of a defect in the plan itself.[1] And the rule that when the city undertakes the execution of public work, though it is not bound to exercise the same, it is liable for negligence in the performance of such work does not usually apply to defective legislation.[2] "There are, ordinarily, many preliminary questions to be settled before the details of any public work (whether it be of purely local or general interest) can be arranged. These are questions which call into force the governmental powers of the corporations. They concern, ordinarily, the expediency of doing the proposed work, and the general manner in which it shall be done. And upon these and similar questions municipal corporations act without responsibility. It is for them to decide in what manner they shall exercise their discretionary and judicial powers, and they incur no liability because of their decisions upon these questions. Thus, in regard to drains and sewers, it is ordinarily for the corporation to decide when it shall have a system of drainage and sewerage, how extensive the system shall be, and what amount of money the corporation shall expend on it. These are questions within the province of the municipality as a governmental agency, and the courts cannot review its conclusions in regard to them. And, until they are settled, and some specific work is decided upon, the legal obligation to exercise care is not brought to life. But as soon as the corporation has determined to construct a public work it enters upon an undertaking which, in all its details, should be subordinated to the rule requiring the use of care, for the work is then

[1] Foster v. St. Louis, 71 Mo. 157; Thompson v. Boonville, 61 Mo. 282; Wegmann v. Jefferson City, 61 Mo. 55; Saxton v. St. Joseph, 60 Mo. 153; Schattner v. Kansas City, 53 Mo. 162; Imler v. Springfield, 55 Mo. 119; Winn v. Rutland, 52 Vt. 481; Willett v. St. Albans, 69 Vt. 330.

[2] Thompson v. Boonville, 61 Mo. 282; Saxton v. St. Joseph, 60 Mo. 153; Saxton v. Beach, 50 Mo. 488; Carroll v. St. Louis, 4 Mo. App. 191. Where the tax bill is void by reason of defective legislation, there can be no recovery against the city. Saxton v. St. Joseph, 60 Mo. 153. The rule has no application to the negligent construction of a bridge. Jordan v. Hannibal, 67 Mo. 673.

ministerial."[3] The Supreme Court of the United States announces the doctrine as follows: "The duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a *quasi* judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extended territory; and the exercise of such judgment and discretion in the selection and adoption of the general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land."[4] The Supreme Court of Missouri has laid down the rule as follows: "The established doctrine in reference to sewers is this: that where they require the exercise of judgment as to the time when and the mode in which they shall be undertaken, and the best plan which the means at the disposal of the corporation renders it practicable to adopt, then their construction is in the nature of a judicial or *quasi* judicial proceeding, and the corporation is not responsible for a defect or want of efficiency in the plan adopted. But when the duty as respects sewers ceases to be judicial or *quasi* judicial, and becomes ministerial, then the corporation will be liable for the negligent discharge or the negligent omission to discharge such duty, resulting in an injury to others."[5]

Sec. 2. *Cases Illustrating General Doctrine.*—Some cases class under the head of discretionary duties all questions relative to the plan to be adopted for the given public work, and they seem to go to the extent of holding that if any defect in the plan adopted causes the injury there is no liability to private action. An early Missouri case holds that a municipal corporation is not liable to an action for damages consequential upon the grading and paving of a street directed by the city authorities in pursuance of an ordinance authorized by the city charter.[6] In this case there was a dissenting opinion, vigorously attacking the rule and contending that recovery should be allowed by the express guaranty of the constitution. Afterwards the St. Louis Court of Appeals applied the rule of this decision in holding that an action for damages against a municipal corporation will not lie because a sewer became insufficient to carry off the increased volume of water which the grading of a certain street caused to accumulate, where there is neither negligence nor carelessness in the execution of the work.[7] This doctrine found favor in a few early Michigan cases. In one case in that State the plaintiff's intestate was killed by running the wagon which he was driving off the end of a culvert, and overturning into a ditch. The injury occurred in the evening and the negligence alleged was that the city had erected too short a culvert, and had left too much of the ditch open and unprotected, which clearly pertained to the plan itself and not to the construction of the work. Here, the city was held not liable.[8] Subsequently, this ruling was approved in a case where a city in building a sewer did not provide a sufficient covering, and the court held that this being a part of the plan,

[3] Jones, Neg. Munic. Corp. § 140, quoted with approval in Donahoe v. Kansas City, 136 Mo. *l. c.* 666, and Goodnow, Home Rule, pp. 127, 128.

[4] Johnson v. Dist. of Columbia, 118 U. S. 18, 1 Mackey, 437; Barnes v. Dist. of Columbia, 91 U. S. 540; Collins v. Waltham, 151 Mass. 6; Leeds v. Richmond, 102 Ind. 372; Kokoma v. Mahan, 100 Ind. 242, 2 Beach, Pub. Corp. secs. 1090, 1091, 1138, 1139, 1148, 1149.

[5] Per Wagner, J., in Thurston v. St. Joseph, 51 Mo. *l. c.* 519, approved in Steinmeyer v. St. Louis, 3 Mo. App. *l. c.* 261, adopted in Donahoe v. Kansas City, 136 Mo. 657, 667.

[6] St. Louis v. Gurno, 12 Mo. 414, which, in effect, is overruled by Thurston v. St. Joseph, 51 Mo. 510.

[7] Steinmeyer v. St. Louis, 3 Mo. App. 256. It appeared that the sewer when constructed was sufficient, but that afterwards it was extended, and other minor sewers connected with it, and that thus the principal sewer was made to drain a larger area than at first, by which the volume of surface water was increased, but the case was determined on the fact that the damage was occasioned by the establishment of the grade of a street. "Thus, the petition charges that, the water collecting in increased quantities after the grading was done, the sewer became insufficient to carry it off, and the damage was produced." See opinion, pp. 260, 261.

[8] Detroit v. Beckman, 34 Mich. 125, 22 Am. Rep. 507. The court said that "the determination to construct a public work, and the prescribing of the plans are and must be matters of legislation, whether done on behalf of the · · · city by or under the direction of the proper board or council. In carrying out the plan there may be negligence attributable to ministerial officers, but negligence in the plan itself must be attributed to the body that devised, ordered or adopted it." Larkin v. Saginaw County, 11 Mich. 88, and Pontiac v. Carter, 32 Mich. 164, hold that no action for injury resulting from exercise of legislative authority will lie.

the city could not be held responsible.[9] In a still later case this court approved the following instruction: "The wrong which must exist to render the city liable is neglect, and there can be no neglect when the work was completed as intended. Negligence cannot be predicated of a work done in accordance with its design or plan, even though it does not sufficiently protect the public."[10] Finally, as will appear, this court has shown a disposition to considerably limit the rule. That the position of the courts may be understood, the Michigan rule as laid down in the above cases cited, has been stated and illustrated at length, which carries the doctrine of non-liability relative to plans perhaps to a further extent than the courts of other States (certainly against the weight of authority).

Sec. 3. *Distinction Between Ministerial and Judicial Duties.*—The distinction between ministerial and legislative or judicial duties, is "plain in theory, but oftentimes difficult of application in particular cases."[11] "The distinction would seem to necessarily rest upon a discretion had by the city to discharge or not discharge the duty because where the duty is absolute and imperative and the city has no discretion, the duty is ministerial, its discharges not depending on the exercise of judgment, but being required by law. It is by force of this reason for the distinction between ministerial and judicial duties that a duty which is judicial before the municipality has entered upon the performance of it, frequently becomes, when its performance is entered upon, ministerial. The municipality has a discretion to do or not to do the work; the duty is, therefore, judicial up to the time that it is determined to do the work; but when the work is ordered the law often requires that it be done in a particular manner, or that it be not done in a certain way, and, therefore, after the work is ordered, the duty of the municipality to do the work in the manner required and not to do it in the way forbidden, is ministerial. The municipality as to these two things has no discretion; as to them its judgment is superseded, controlled and directed by the requirements of the law, and its duty is to comply with these requirements."[12]

Sec. 4. Limitations on Doctrine of Non-Liability on Account of Plans—Sewers.—The logical application of the rule under consideration is bound to work injustice in many instances. Some recent cases, have, in effect, abandoned the doctrine altogether, and others have sought to limit it. Thus, the Supreme Court of Michigan (per Cooley, C. J.) refused to apply it in a case where the defect in the plan resulted in an invasion of the rights of an individual, in the following language: "It is very manifest from this reference to authorities that they recognize in municipal corporations no exemption from responsibility where the injury the individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon his property. * * * If the corporation send people with picks and spades to cut a street through it (the private property) without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon a land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable and no more an actionable wrong than the other. Each is a trespass and in each instance the city exceeds its lawful jurisdiction." The case points out the distinction usually applied between incidental injuries resulting from imperfect legislation and direct injury accomplished by a corporate act in the nature of a trespass.[13] In a later case this same court held that where the plan must necessarily cause an injury to private property equivalent to some appropriation of the enjoyment thereof to which the owner is entitled, the city will be liable.[14] The Court of Appeals of New York sustained this view in a case where it was held than if the plan of sewerage inevitably resulted in causing the water to back up and flow upon the property of the plaintiff the city was clearly liable. Here the capacity of the sewer was insufficient.[15] Likewise, in

[9] Toolan v. Lansing, 37 Mich. 152, 38 Mich. 315.

[10] Davis v. Jackson, 61 Mich. 530.

[11] Dillon, Munic. Corp. § 1049. See Steinmeyer v St. Louis, 3 Mo. App. *l. c.* 262.

[12] Per Hall, J., in Young in Kansas City, 27 Mo. App. *l. c.* 114.

[13] Ashley v. Port Huron, 35 Mich. 296, 301, 24 Am. Rep. 552.

[14] Defer v. Detroit, 67 Mich. 346.

[15] Seifert v. Brooklyn, 101 N. Y. 136, 54 Am. Rep. 654, approved in 2 Dillon, Munic. Corp. (4th Ed.) n. p. 132.

Minnesota, it has been held that where the acts of the corporation constitute a positive trespass, although resulting from defective plans, they are actionable, and it is such trespass for the city to intercept the natural flow of surface water, and gather it up and conduct it in another direction by means of a gutter or other artificial channel, and construct the gutter of inadequate capacity, in consequence of which the water is cast in large and injurious quantities upon the premises of property owners.[16] It has long been the law in Indiana "that a municipal corporation is liable for negligence in devising the plan of a sewer constructed by it, as well as for negligence in the manner of doing the work."[17]

The Supreme Court of California, as well as that of Iowa, has declared that when a city does provide water ways, it becomes its duty to provide such as are sufficient to carry off the water that might reasonably be expected to accumulate.[18] In a sewer case where property was flooded by reason of the incapacity of the sewer, the Kansas City Court of Appeals held the city liable, but found that the authority conferred by ordinance upon the city engineer to determine the dimensions of a culvert was ministerial and not *quasi* judicial in character.[19] Some municipal charters require the dimensions of sewers to be prescribed by ordinance and prohibit the same from being fixed by city officials.[20] Therefore, under such circumstances the act of determining such dimensions becomes technically a discretionary and *quasi* legislative one. If the injury causing damage should result from defects of plan of construction adopted by officials which related to matters of detail not necessary to be specified in the ordinance, for example, those things which may be embraced within the comprehensive term of appurtenances, as manholes, inlets, etc., manifestly liability would exist, under the doctrine above stated, because the sewer would be rendered defective for use by the direct act of the city, aside from the often shadowy distinction, in theory, between ministerial and judicial acts.

Judge Dillon says that, upon principle, the corporation is probably not liable to a civil action "for any defect or want of efficiency in the plan of sewerage or drainage adopted; nor, according to the prevailing view, for the insufficient size or want of capacity of gutters or sewers for the purpose intended, particularly if the adjoining property is not in any worse position than if no gutters or sewers whatever had been constructed."[21]

Sec. 5. *Defective Plans in Constructing Streets.*—As stated, the doctrine is everywhere recognized that the duty of the municipality to improve its streets is a legislative or judicial one, which the city, in its discretion, may determine to exercise or not exercise, but the duty in doing the work, when decided upon, has been declared in certain

[16] Pye v. Makato, 36 Minn. 373, 375. New Jersey, Soule v. Passaic, 47 N. J. Eq. 28, 20 Atl. Rep. 346. A city is liable for damages caused to private property by grading street, when a private owner of the soil over which the streets are laid would be liable if improving for his own use. Henderson v. Minneapolis, 32 Minn. 319, stated in 36 Minn. *l. c.* 374.

[17] "Of course as long as no work is done under the plan no liability can arise, nor can any liability exist where there is nothing more than a failure to adopt a plan. But where a plan is adopted and carried into execution, then there is liability, if there was negligence in devising the plan. It is the duty of the municipal corporation to exercise reasonable care in providing a plan as well as in doing the work." Terre Haute v. Hudnut, 112 Ind. 542, 544. North Vernon v. Voegler, 103 Ind. 314, collates the authorities and holds that "the doctrine is not only sustained by authority but is sound in principle. Suppose that the common council · · · determines to build a sewer and cover it with reeds, can it be possible that the corporation can escape liability on the ground that it erred in devising a plan?"

[18] Spangler v. San Francisco, 84 Cal. 12, 17, 23 Pac. Rep. 109; Damour v. Lyons City, 44 Iowa, 276, 282; Power v. Council Bluffs, 50 Iowa, 197, 202. See Hazzard v. Council Bluffs, 79 Iowa, 106.

[19] Under the Kansas City charter, it was held that the common council is not required to prescribe the dimensions of a culvert and that the ordinance properly conferred this authority upon the city engineer. Young v. Kansas City, 27 Mo. App. 101.

[20] St. Louis Charter, Art. VI, §§ 21, 22.

[21] 2 Dillon, Munic. Corp., sec. 1046. This seems to be the rule in Minnesota. Pye v. Mankata, 36 Minn. 373, 375. "It is perhaps impossible to reconcile the cases on this subject, and the courts of the highest respectability have held, that if the sewer, whatever its plan, is so constructed as to cause a positive and direct invasion of the plaintiff's private property, as by collecting and throwing upon it to his damage, water which would not otherwise have flowed or found its way there, the corporation is liable. This exception to the general doctrine, was properly limited and applied, seems to be founded on sound principles and will have a salutary effect in inducing care upon the part of the municipality to avoid such injuries to private property, and will operate justly in giving redress to the sufferer if such injuries are inflicted." 2 Dillon, Munic. Corp., § 1047.

respects to be ministerial by the Kansas City Court of Appeals as follows: "But as the further and imperative duty rests on the corporation to protect its streets and sidewalks from dangerous nuisances and obstructions, and to keep them in a reasonably safe condition for use by the public, by day and by night, it would be an absurd contradiction to say that it might determine upon a plan for the improvement of its streets, which would expose the public to perils and dangers of life and limb by digging yawning ditches along and about its highways, and leave them unprotected and unguarded, and without any danger signals, to entrap the unwary, and often the most vigilant, at night."[22] By the weight of authority this rule is established: The principle that actionable negligence cannot be predicated of the plan itself, does not go so far as to exempt from liability where the plan leaves the streets in an unsafe and dangerous condition for public use.[23] Accordingly the Kansas City Court of Appeals held that where a street is rendered unsafe for travel by the direct act of the city, the corporation will be held liable where the doctrine of implied municipal responsibility is recognized for unsafe streets, irrespective of the plan itself.[24] The Supreme Court of Michigan holds that a township cannot construct an unsafe and dangerous road—one not safe and convenient for public travel—and shield itself behind its legislative power to adopt a plan and method of building and constructing in accordance therewith. The court refused to construe the statute requiring townships to keep highways in repair so as to relieve them from liability on the ground that the township had adopted a method of construction, and had built according to the plan.[25] In Ohio, a city was held liable for damages caused by the fall of a bridge built upon a defective plan, furnished by the city engineer.[26]

[22] Per Philips, P. J., in Hinds v. Marshall, 22 Mo. App. *l. c.* 214, citing Lower v. Sedalia, 77 Mo. 431; Oliver v. Kansas City, 69 Mo. 79; Beaudean v. Cape Girardeau, 71 Mo. 392; Russell v. Columbia, 74 Mo. 480. The Hinds case has been approved in Young v. Kansas City, 27 Mo. App. 101, 114.

[23] 2 Dillon, Munic. Corp. (2d Ed.), pp. 1046, 1047, note 1, § 1024; 2 Thompson, Neg., p. 736, note 9.

[24] Hinds v. Marshall, 22 Mo. App. 208.

[25] Malloy v. Walker Township, 77 Mich. 448.

[26] Dayton v. Pease, 4 Ohio St. 80. See Bailey v. New York, 3 Hill (N. Y.), 531.

Sec. 6. *Reasonableness of Plan.*—"Any particular plan that may be adopted must be a reasonable one," says the Supreme Court of Maryland, "and the manner of its execution thence becomes, with respect to the right of the citizens, a mere ministerial duty."[27] "It is the duty of the municipal corporation to exercise reasonable care in providing a plan, as well as in doing the work."[28] "After a careful consideration of this entire question, we have come to the conclusion that where a street, as planned or ordered by the governing board of the city, is so manifestly dangerous that a court upon the facts can say, as a matter of law, that it was dangerous and unsafe, * * * the city should be held liable."[29]

Sec. 7. *Conclusion.*—The whole superstructure of the liability of municipal corporations for negligence and trespasses upon property should be built upon the idea that private property cannot be taken (nor damaged in some States) for public use without just compensation. In support of this view it is argued that "there can be no distinction on principle between the case where a municipal corporation—let us say in prosecuting some public work within its charter powers—unlawfully damages my property or injures my person, and where acting for its own purposes and within the general scope of its charter powers, it takes my property. Damaging is a smaller injury than taking, and any principle that will sustain a liability for damaging will sustain a liability for taking."[30]

So far as the constitutional rights of the property owner are trespassed upon, it is immaterial whether this results from negligence in the doing of the work, or from a defective plan. In either case the city has violated the constitution, and no good reason is perceived why it should be permitted to protect itself because of a defective plan, however conscientiously it may have been conceived upon the part of the officers or agents who prepared it. Therefore, it appears logical to conclude that in all cases where there has been a dam-

[27] Hitchins v. Frostburg, 68 Md. 100, 6 Am. St. Rep. 422.

[28] Per Elliott, C. J., in Terre Haute v. Hudnut, 11 Ind. 542, 544.

[29] Gould v. Topeka, 32 Kan. 485, 493, 49 Am. Rep 496,

[30] Article by Judge Seymour D. Thompson 33 Am L. Rev., p. 708.

age to, or taking of, private property by the direct act of the city, liability to private action should lie. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon such property than has a private individual or corporation. The discretion reposed in the authorities by a municipal charter, and the general principles of law applicable, relating to the character of plans, never gives, and never could give, authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other.[31]

EUGENE MCQUILLIN.

St. Louis, Mo.

[31] See Rome v. Portsmouth, 56 N. H. 291, approved in Ashley v. Port Huron, 35 Mich. 296, 301.

CRIMINAL LAWS—PLAYING BASEBALL ON SUNDAY — CONSTRUCTION OF STATUTE—HABEAS CORPUS.

EX PARTE NEET.

Supreme Court of Missouri, June 30, 1900.

1. The game of baseball is not within the prohibition of Rev. St. 1899, § 2242, providing that every person who shall be convicted of horse racing, cock fighting, or playing at cards or games of any kind on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor.

2. One who is imprisoned, under a judgment of conviction by a court of competent jurisdiction, for an act which is not in contravention of any law, may obtain his release on writ of *habeas corpus*, under Rev. St. 1889, §§ 5375, 5378, providing for the discharge of a prisoner on *habeas corpus* when no legal cause is shown for the imprisonment.

MARSHALL, J.: This a proceeding by *habeas corpus*, instituted by the petitioner for the purpose of obtaining his discharge from the custody of the sheriff of Lafayette county, and from his imprisonment in the county jail, where he is held under a warrant of commitment issued by the criminal court of that county upon a conviction before that court "on a charge of playing baseball on Sunday," the information simply charging that the petitioner and others therein named, "on the 4th day of June, 1899, at the county of Lafayette and State of Missouri, did then and there unlawfully play at a game of ball, commonly called 'baseball,' on the first day of the week, commonly called 'Sunday,' against the peace and dignity of the State," etc. Among the other persons charged in the information with having played the game of baseball with the petitioner was one R. Vaughan, who was also convicted. He appealed to the Kansas City Court of Appeals, and that court dismissed the appeal on the ground that an appeal would not lie from a conviction upon an information. 3 Mo. App. Rep. 268.

Two questions are presented by this case: First, is it unlawful in Missouri to play a game of baseball on Sunday? and, second, is *habeas corpus* an available remedy to one convicted and imprisoned for so doing?

1. Section 2242, Rev. St. 1899, is relied on as furnishing support for the conviction in this case. That section is as follows: "Every person who shall be convicted of horse racing, cock fighting, or playing at cards or games of any kind, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor and fined not exceeding fifty dollars." This section (then section 1580, Rev. St. 1879), was construed by the Kansas City Court of Appeals in the case of State v. Williams, 35 Mo. App. 541, to prohibit playing a game of baseball on Sunday. It was conceded that games of baseball are not within the express prohibition of the statute, and it was likewise conceded that "where particular words of a statute are followed by general words, as if, after the enumeration of classes of persons or things, it is added, 'and all others,' the general words are restricted in meaning to objects of the like kind with those specified." But it was held that the words, "or games of any kind," must be construed to embrace games of baseball, because the statute "was evidently intended to prevent a desecration of the Sabbath, by restraining the doing of those things which are offensive to a Christian community by being done on that day," and that "the statute was not aiming to prevent the doing of things immoral *per se*, or the tendency of which is immoral, as the inhibition is not against gambling or betting on the games, but merely against the doing the act on that day, though it be not immoral or tending to immorality." At the same (March) term, 1889, the St. Louis Court of Appeals, in the case of Association v. Delano, 37 Mo. App. 284, *loc. cit.* 289, held that section 1580, Rev. St. 1879 (now section 2242, Rev. St. 1889), only prohibited "games of chance, or other games of an immoral tendency, and that it does not involve a prohibition of athletic games or sports, which are not of an immoral tendency, but which tend to the physical development of the youth, and are rather to be encouraged than discouraged." It was also held that the general words, "or games of any kind," must be construed to mean games of the same kind as the games specially designated in the statute. It was accordingly held that a contract made by the defendants, as members of the Amateur Athletic Association, with the plaintiff, for the use of the

fair grounds for the purpose of playing athletic games and sports thereon on Sunday, was a valid contract. But, as the decision was in conflict with the decision of the Kansas City Court of Appeals, in State v. Williams, *supra*, the case was certified to this court. This court held that there is no statute in this State which prohibits athletic games and sports on Sunday, unless section 3854, Rev. St. 1889 (formerly section 1580, Rev. St. 1879, and now section 2242, Rev. St. 1889), does so, and, after citing that section, said: "But these prohibitions are evidently leveled against sports and games that have a demoralizing tendency, and do not extend to mere athletic sports. Besides, this section is penal, and therefore to be strictly construed. Howell v. Stewart, 54 Mo. 400; Fusz v. Spaunhorst, 67 Mo. 256." And then added: "But, further, in this instance the words, 'or games of any kind,' fall under the rule which prescribes that, where general words follow particular ones, they are to be construed as applicable to things or persons of a like nature. State v. Bryant, 90 Mo. 534, 2 S. W. Rep. 836, and cases cited; City of St. Louis v. Laughlin, 49 Mo. 559." The decision of the St. Louis Court of Appeals was approved and affirmed, and while the decision of the Kansas City Court of Appeals, in State v. Williams, *supra*, was not expressly overruled or disapproved, it was referred to as the basis of the action of the St. Louis Court of Appeals in certifying the case to this court, and therefore the Williams case must be regarded as overruled.

Section 2242, Rev. St. 1899, has been on the statute books of Missouri, in exactly the same words, ever since 1835. Rev. St. 1835, tit. "Crimes and Punishments," art. 8, § 30, p. 209; Rev. St. 1845, ch. 47, art. 8, § 33, p. 405; Rev. St. 1855, ch. 50, art. 8, § 35, p. 631; Gen. St. 1865, ch. 206, § 34, p. 819; Rev. St. 1879, ch. 24, art. 8, § 1580, p. 274; Rev. St. 1889, ch. 47, art. 8, § 3854, p. 919. Playing a game of baseball on Sunday (or on any other day) could not have been in the minds of the lawmakers when this provision of law was enacted in 1835, for the very simple reason that such a game was wholly unknown to art at that time. The doctrine of *ejusdem generis* is as rock-ribbed in the law of this State as any principle ever announced. As applied to penal statutes especially, it is only a humane doctrine, and accentuates the wisdom of the fathers when they objected to being punished for offenses which had not been declared to be offenses by the law. It observes the respective rights of the different co-ordinate branches of the government, by requiring the legislature to enact the laws, and the judiciary to enforce, but not create, the laws, not even by construction. Baseball does not belong to the same class, kind, species, or *genus*, as horse racing, cock fighting, or card playing. It is to America what cricket is to England. It is a sport or athletic exercise, and is commonly called a "game," but it is not a gambling game, nor productive of immorality. In a qualified sense, it is affected by chance; but it is primarily and properly a game of science, of physical skill, of trained endurance, and of natural adaptability to athletic skill. It is a game of chance only to the same extent that chance or luck may enter into anything man may do. But when chance or luck is pitted against skill and science, it is as fair an illustration of what will result as any test that could be applied.

If the view of the Williams case had been adopted, this statute would have been elastic enough to cover every game that ever was or ever will be invented, no matter whether it was harmless, promotive of physical or mental development, or deleterious to both. It would prevent games of chess, backgammon, jacks, authors, proverbs, faro, keno, and poker alike, and when played on Sunday any one would have been as illegal as any other. Such a construction would have curtailed many of the pleasures of many of our people, without elevating them or improving their moral tone. Until the lawmakers expressly provide for such sweeping changes in the lives and customs and habits of our people, it is not proper for the courts by construction to impair their natural rights to enjoy those sports or amusements that are neither *mala in se* nor *mala prohibita*—neither immoral, nor hurtful to body or soul. We therefore conclude that there is no law in this State which prevents playing a game of baseball on Sunday, and therefore the defendant is imprisoned for the doing of an act which is not unlawful, and therefore the imprisonment is wrongful.

2. The only remaining question is whether *habeas corpus* is a proper remedy. The rule must now be regarded as settled in this State that if a person is imprisoned for an act which is not in contravention of any existing law, or if the act under which he is held is unconstitutional, *habeas corpus* is a proper remedy to restore to him his freedom, of which he has been improperly and illegally deprived. *Ex parte* Slater, 72 Mo. 102; *Ex parte* Arnold, 128 Mo. 256, 30 S. W. Rep. 768, 1036; *Ex parte* O'Brien, 127 Mo. 477, 30 S. W. Rep. 158; *Ex parte* Craig, 130 Mo. 590, 32 S. W. Rep. 1121; *Ex parte* Smith, 135 Mo. 223, 36 S. W. Rep. 628. The underlying reason is that an unconstitutional act is no law at all, and that no court has a right to imprison a citizen who has violated no law of the State, but that such act, even if done by a court under the guise and form of law, is as subversive of the right of the citizen as if it was done by a person not clothed with authority, and hence it is the duty of this court, under section 3 of article 6 of the constitution, to discharge him by means of a writ of *habeas corpus;* this, too, irrespective of any other relief which may be available to him; for it is the very purpose of this writ to restore freedom to those who have been deprived of it without warrant or authority of law. Of course it will be understood that *habeas corpus* will not be allowed to perform the functions of a writ of error or an appeal, but will

only lie where the imprisonment is absolutely without authority of law, or for an offense which has not been made an offense against the law, or where the act under which he is imprisoned is unconstitutional, and therefore it is no law at all. This is the plain meaning of sections 5375, 5378, Rev. Stat. 1889. For these reasons the petitioner is discharged from custody as prayed. All concur as to first paragraph, and Gantt, C. J., and Sherwood and Burgess, JJ., concur also as to second paragraph. Robinson, Brace and Valliant, JJ., dissent as to second paragraph.

NOTE — *Construction of Criminal Statutes in Which General Words Follow Particular Words.*— The first rule to be borne in mind in considering statutes of a criminal or penal nature is that such statutes are to be construed strictly in those parts which are against persons charged with their violation and liberally construed in those parts which are in their favor. Bishop, Stat. Cr., § 193; State v. Bryant, 90 Mo. 535. Moreover, penal and criminal statutes must be definite and certain in their terms, and should not be expanded so as to subject anyone to penalty who is not fairly and reasonably within its language. Such statutes are absolutely non-elastic and no one should be made subject to their provisions by implication. State v. Barr, 39 Conn. 40; Koen v. State, 76 Ill. 294; State v. Schuchmann, 133 Mo. 111. On the other hand, while statutes pertaining to crimes and their punishment should be strictly construed, and nothing left to intendment, they should not be so construed as to thwart the evident will and intention of those who enacted them, when that intention is plainly and fairly deducible from the law itself. State v. Bishop, 128 Mo. 373; Woodsworth v. State, 26 Ohio St. 196; State v. Holman, 3 McC. (S. Car.) 306.

Another rule of construction more pertinent to the decision in the principal case is the doctrine of "*ejusdem generis*." It may be stated as follows: Where particular words of a statute are followed by general words, as if, after the enumeration of classes of persons or things, it is added, "and all others"—the general words are restricted in meaning to objects of the like kind with those specified. Or as Lord Tenterden expressed it in the leading case of Sandiman v. Breach, 7 B. & C. 96, "where general words follow particular ones the rule is to construe them as applicable to persons or things *ejusdem generis*." This rule is of wide application and is firmly settled in the law. In the case of State v. Bryant, *supra*, a gun and target, although used for the purpose of betting, was held not to be within the provisions of the following statute: "Every person who shall keep any table or gambling device, called faro bank, E. O., roulette, keno, or any kind of gambling device designed for the purpose of playing any game of chance for money or property, shall," etc. The court said: "It is very evident that the words 'or other gambling device' employed in this section, were only designed to apply to such gambling devices as are of a kindred nature and similar kind to those mentioned." A familiar example of this rule is found in the case of Reg. v. Whitnash, 7 B. & C. 596. A statute of parliament provided that "no trademan, artificer, workman, laborer, or other person whatsoever," should exercise his ordinary calling on the Lord's day. It was held, that the words "other person whatsoever" did not include a farmer, because not of like denomination with those specifically named; Bayley, J., remarking that, if all persons were meant there was no need of the specific enumeration. In construing the penal code of New York which prohibited all shooting, hunting and playing on the first day of the week, it was held by the supreme court that playing baseball in an open park on Sunday was not such playing on Sunday as was prohibited by statute. State v. Dennim, 35 Hun, 327.

In the case of State v. Williams, 35 Mo. App. 541, overruled by the court in the principal case, the doctrine of "*ejusdem generis*" while recognized is held subject to limitations. On a statement of facts identical with those in the principal case the court reached an opposite conclusion, and held, that playing at "baseball" came within the provisions of "playing at games of any kind." After stating and recognizing the general rule of *ejusdem generis*, just announced, the court said: "But the object of this rule must not be overlooked; its object is, not to defeat, but to ascertain, and carry out, the legislative intent. Where, therefore, the application of the rule would be in the face of the evident meaning of the legislature, it should not be applied." Several other cases might be cited to show the limitation to which this rule is subject. In Woodsworth v. State, 26 Ohio St. 196, the statute was: "That if any person shall abuse any judge or justice of the peace, resist or abuse any sheriff, constable or other officer, in the execution of his office," etc. Held, that the supervisor of a township was covered by the words, "or other officer." In State v. Holman, 3 McCord (S. Car.), 306, the statute recited that whoever shall be convicted of knowingly packing into any bag or bale of cotton any stone, wood, trash or any matter or thing whatsoever," etc. Held that, under this statute defendant was liable for "packing and pouring" an "undue quantity of water" into a bale of cotton. One of the strongest and most interesting cases in this direction is that of Commonwealth v. Percavil, 4 Leigh (Va.). The statute in this case read as follows: "Any person who shall cut down any tree growing on the land of another, or destroy or injure any building, fence or other improvement, or who shall carry away or destroy any tree or other timber, or property, real or personal," etc. Defendant was convicted under this statute for killing hogs belonging to another. In keeping with these decisions the Supreme Court of Alabama, in Foster v. Blount, 18 Ala. 687, said that the rule here discussed, and which was invoked in each of the cases above cited, is a rule of construction to ascertain the intention of the legislature, and when that is clear, the courts should be bound by it. "If we were to restrict the meaning of general words, when the framers of the law, by the use of them, intended to embrace other persons or things not embraced by the particular words, we annul the law instead of executing it."

Habeas Corpus as a Remedy to Test the Constitutionality of a Criminal Statute under which a Person is Arrested or Confined.—There was formerly much conflict of opinion and authority whether a court in *habeas corpus* proceedings could investigate and question the constitutionality of a statute under whose provisions a person is arrested and confined. In many such cases, if that were the only point involved, the court would remand the prisoner. *Ex parte* Harris, 47 Mo. 164; Platt v. Harrison, 6 Iowa, 79; Matter of Underwood, 30 Mich. 502; *Ex parte* Fisher, 6 Neb. 309; *In re* Callicott, 8 Blatchford (U. S.), 89. In *Ex parte* Harris, *supra*, the reason of these decisions is succinctly stated. A man was arrested for violating the law prohibiting the introduction of Texas cattle into the State during certain periods of the year. He

brought *habeas corpus* proceedings in the supreme court. Held that where one has been arrested and detained on legal process by a court having jurisdiction of the person and the offense and is in custody of the proper officer, and by virtue of a provision of the law, the court will not, on a writ of *habeas corpus*, inquire into the constitutionality of the law under which he was arrested. He should test the validity of that question by means of a trial in the appropriate court. The court said: "Whether the legislature exceeded its powers in the passage of the law sought to be passed upon we will not inquire in this proceeding. The petitioner can have his trial, and if he is dissatisfied with the verdict and judgment, and desires to test the validity of the law, the courts are open to him, as they are to all other persons charged with the violation of the laws of the land. Admit this proceeding and then every person charged with committing an offense of any kind or description whatsoever, instead of standing his trial and litigating the matter as the law directs, can come here and ask our advice as to the validity of the law under which he is arraigned. Such a precedent cannot be established."

However, since the decision of the United States Supreme Court in *Ex parte* Siebold, 100 U. S. 371, the trend of authority has been overwhelmingly in favor of extending the advantages of *habeas corpus* proceedings to cases of this character. Whitcomb's Case, 120 Mass. 118; *Ex parte* Smith, 135 Mo. 223; *In re* Payson, 23 Kan. 757; *Ex parte* Rollins, 80 Va. 314; *Ex parte* Mato, 19 Tex. App. 112. In *Ex parte* Siebold, *supra*, it was said: "An unconstitutional law is void and is as no law. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. "The real reason, however, for this later trend of the authorities is, undoubtedly, the irresistible attachment of the people to the full benefits afforded by the "greatest of all writs," that of *habeas corpus*. This proceeding is a right which the people guard with exceptional jealousy and the interposition of legal quibbles or technicalities is not permitted to curtail any of its inestimable privileges. Being the bulwark of individual liberty, a most liberal construction is insisted upon with a view of enlarging rather than restricting its operation. But the legal reasons assigned by the courts for this extension of the right of *habeas corpus* is that a court has no jurisdiction to confine a person under an act that is unconstitutional, and, therefore, void. Lack of jurisdiction, of course, is one of the original and strongest grounds for the issuance of the writ of *habeas corpus*. This position of the courts is well stated by Judge Sherwood in *Ex parte* Smith, *supra:* "If it be true, as must be true, that an unconstitutional law is no law, then its constitutionality is open to attack at any stage of the proceedings, and even after conviction and judgment; and this upon the ground that no crime is shown, and, therefore, the trial court had no jurisdiction, because its criminal jurisdiction extends only to such matters as the law declares to be criminal; and if there is no law making such declaration, or what is tantamount thereto, if that law is unconstitutional, then the court which tries a party for such an assumed offense transcends its jurisdiction, and he is consequently entitled to his discharge, just the same as if the non jurisdiction of such court should, in any other manner, be made apparent."

A. H. ROBBINS.

JETSAM AND FLOTSAM.

QUOTIENT SENTENCES.

In McAnally v. State, 57 S. W. Rep. 832, decided in the Court of Criminal Appeals of Texas, it appeared that a jury having determined the guilt of the defendant of burglary, but being unable to agree offhand on the term of his punishment, it was resolved that each juror should put down his proposed period of imprisonment, and that the figures should be added and then divided by twelve. This resulted in a proposed term of five years and nine months, whereupon one of the jurors moved that it be made six years, which was done. It was not shown that the jury had agreed to be bound by the result of the "quotient" experiment, nor in fact, as it appeared, were they so bound. It was held that the verdict should not be set aside. The ruling of the court in this case is clearly correct in view of the fact that the quotient result was not, but a longer term of imprisonment actually was, fixed by the jury. The rule has been laid down that "the method of arriving at the amount of the fine, or of damages when they are unliquidated, or the length of the term of imprisonment in criminal cases, whereby each juror puts a number into a hat, and all the numbers so put in are added up, and the sum divided by twelve, vitiates the verdict, when the jurors agree in advance to abide by the result. But it is otherwise when the amount which each juror puts into the hat is a mere proposition, and there is no previous agreement to abide by the result." 2 Thomp., Trials, sec. 2601.

Of course, in some cases, this distinction may be little more than a technical one. Still, it is well to preserve the rule—as liberty to violate it might lead to serious abuses—that a verdict must not be the result of lot or hazard, and the principal case illustrates that the merely tentative use of the quotient method may be a very different thing from agreeing in advance to be bound by it. It may be an aid to more practical and more definite deliberation if the jurors resort to such expedient to arrive at a presumptive figure. Indeed, some such method of getting a starting point must frequently be a necessity where there is wide divergence of view upon what at best can be only a matter of opinion.

A reflection is, however, suggested that in criminal cases it is, on the whole, better to leave the discretionary fixing of a term of imprisonment, within the limits prescribed by law, to the trial judge rather that confide such function to the jury.

On January 10, 1900, in criticising a bill that had been introduced in the federal house of representatives, providing generally that jurors rendering verdicts of guilt upon indictments for felony not punishable by death, should assess the punishment of persons so convicted, and that the penalty so assessed should be imposed, unless the court should prescribe a lesser one, we used the following language:

"The attitude of the juror is necessarily to a considerable extent one of compromise. The 'quotient verdict' disposition would inevitably crop out in the fixing of criminal sentences. Indeed, it would doubtless often be carried so far as to enable a single obstinate juror to bring his associates to an agreement on the lightest penalty within their power to inflict. Jurors of average ability and conscientiousness, who would not join in the absurdity of an absolute acquittal, might still make very substantial concessions in order to avoid a mistrial. If it be suggested that such considerations involve an

arraignment of the whole system of trial by jury, the answer is that the burden of proof of advantage to be gained is upon those proposing a change from the present system. The feature of judicial sentence —of permitting the court to exercise such discretion as exists—has worked well, and very definite and tangible grounds should be assigned before departing from it.

"The act in the form as reported may be regarded as one for additional protection of criminals from justice. Lapse of time, that assuages even personal griefs and deadens the force of all emotions, necessarily conduces to clemency towards a prisoner. When a crime is fresh in the public mind the prevailing feeling of indignation toward its perpetrator would often make it difficult for him to obtain his fair due in a trial promptly moved. (On June 1, 1896, we criticised adversely the case of Hoover v. State, 66 N. W. Rep. 1117, in the Supreme Court of Nebraska, on the ground of its sanctioning too great expedition in bringing an accused person to trial.) As time elapses the sentiment of resentment largely subsides, and there succeeds an entirely new emotion inspired by then existing circumstances —commiseration for a fellow mortal and his family who are in grievous trouble. Jurors are prone to overlook the demands of justice under the influence of their sympathy. Judges are not dead to such influence, but a judge must take the sole and conspicuous responsibility for his acts. Moreover, the only reason for his official being is the doing of justice according to a rational system framed for the protection of society. In our judgment, it would constitute a serious menace to social peace and order to transfer the discretion in question to the sentimental pity of the average jury."—*New York Law Journal.*

HUMORS OF THE LAW.

In the West of Ireland on a certain circuit a judge was wont to doze during the speeches of counsel.

On one occasion counsel was addressing him on the subject of certain town commissioners' rights to obtain water from a certain river, water being very scarce at the time. During his speech he made use of the words:

"But, my Lord, we must have water—we must have water."

Whereupon the judge woke up, exclaiming: "Well, just a little drop—just a little drop! I like it strong."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACTION BY STATE—Effect of Judgment.—When a State invokes the judgment of a court for any purpose, it lays aside its sovereignty, and consents to be bound by the decision of the court, whether such decision be favorable or adverse.—STATE v. KENNEDY, Neb., 57 S. W. Rep. 87.

2. ADVERSE POSSESSION — Conflicting Patents.—Adverse possession on the part of the junior patentee will not bar a recovery the senior patentee, unless such possession has been not only actual, but so continued for 15 years as to have furnished a cause of action every day during that period.—BARR v. POTTER, Ky., 57 S. W. Rep. 478.

3. APPEAL — Diminution of Record — Jurisdiction.—The supreme court has no jurisdiction to make inquiry into the fact whether an alteration has or not been made in any of the original papers which constitute the record of a case, when such alterations are alleged to have been made before the filing in the office of the clerk below of the bill of exceptions duly certified, and, consequently, before the record for this court has been made up and certified. Under such circumstances, jurisdiction to inquire into the matter is confined to the trial court.—CLARK v. STATE, Ga., 36 S. E. Rep. 297.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity —Bankruptcy Law.—The assignment law (Rev. St. 1895, arts. 71-86), in so far as it authorizes debtors to exact discharges of accepting creditors, is suspended by the national bankruptcy act; but an assignment thereunder conveying all the debtor's property subject to payment of his debts, for the equal benefit of all his creditors who may accept under it, is otherwise valid, except as against proceedings seasonably taken under such bankruptcy act.—PATTY-JOINER & EUBANK CO. v. CUMMINS, Tex., 57 S. W. Rep. 566.

5. ATTACHMENT—Wrongful Levy.—The sureties in an attachment bond are not liable for the wrongful levy of the attachment on the property of another than the debtor, there being no breach of the bond unless the attachment was wrongfully obtained.—MARTIN v. TURPIN, Ky., 57 S. W. Rep. 459.

6. ATTORNEY AND CLIENT—Fees.—In an action by an attorney for fees, the petition alleged that, at the time of the employment, plaintiff told defendant that the customary fee for securing a compromise before suit was 5 per cent., and a collection after suit, 10 per cent., and further alleged that the services were rendered at the special instance and request of defendant, and were reasonably worth a certain sum. Held, that the petition is properly one on *quantum meruit*, and the trial court did not err in so treating it, where it appeared that plaintiff secured for defendant a compromise of a disputed claim.—WARDER v. SEITZ, Mo., 57 S. W. Rep. 537.

7. ATTORNEY AND CLIENTS—Liens.—An attorney successfully conducted a suit to recover his client's lands under an agreement whereby he was to receive for his services a mortgage on the lands for the payment of his fee. Before he received it, the land was sold to the contesting defendant, who knew of the agreement, and promised to pay the fee as part of the consideration. Held, that the attorney was entitled in equity to a lien on such lands for the amount of his fee.—KILBOURNE v. WILEY, Mich., 83 N. W. Rep. 99.

8. BANKRUPTCY—Appeal—Time of Taking Appeal.—Where the appellant, within 10 days after a decree of the district court adjudging him a bankrupt, prayed an appeal therefrom, which was allowed by the judge, and filed an appeal bond, but the prayer for the appeal and its allowance, and the citation and service

thereon were not filed in the district court until after the expiration of the 10 days, held, that the appeal was not "taken" within the time limited by Bankr. Act 1898, § 25a, and must be dismissed.—NORCROSS v. NAVE & MCCORD MERCANTILE CO., U. S. C. C. of App., Eighth Circuit, 101 Fed. Rep. 796.

9. BANKRUPTCY—Appeal—Who may Appeal.—Under Bankr. Act 1898, § 25a, an appeal from an order of the district court allowing a claim presented by a creditor against the estate of a bankrupt, and which was objected to and contested by another creditor, cannot be taken by such objecting creditor, but only by the trustee in bankruptcy, as the representative of all the creditors.—CHATFIELD V. O'DWYER, U. S. C. C. of App., Eighth Circuit, 101 Fed. Rep. 797.

10. BANKRUPTCY—Fee of Creditor's Attorney—Lien.—Where a creditor claims priority of payment out of the estate of a bankrupt on the ground of his having a lien on property of the bankrupt, and is opposed by the trustee and by other creditors, the attorney for such claimant, who successfully prosecutes the claim in the court of bankruptcy, and secures its allowance, is entitled to a lien for his services on the fund thus secured for his client; and the court of bankruptcy has jurisdiction to determine the right to such lien, fix its amount, and enforce it in the distribution of the property.—IN RE RUDE, U. S. D. C., D. (Ky.), 101 Fed. Rep. 805.

11. BANKRUPTCY — Involuntary — Who may be Adjudged.—Although Bankr. Act, § 4b, excepts from the operation of the provisions as to involuntary bankruptcy a "person engaged chiefly in farming," a merchant who commits an act of bankruptcy may be adjudged bankrupt on a petition duly filed by his creditors within the statutory period thereafter, notwithstanding the fact that, after the act of bankruptcy charged, he abandoned the business in which he had been engaged, and became chiefly occupied in farming, and so continued to the filing of the petition.—IN RE LUCKHARDT, U. S. D. C., D. (Kan.), 101 Fed. Rep. 807.

12. BANKRUPTCY — Petitioning Creditors — Wife of Bankrupt.—Where the law of the State permits the creation of enforceable debts as between husband and wife, a married woman who is an actual creditor of her husband in good faith, having a claim against him which would be provable in bankruptcy, may join in a petition in involuntary bankruptcy against him, or, if such claim amounts to $500 or over, and all his creditors are less than 12 in number, she may maintain such petition alone; but her alleged debt will be carefully scrutinized, to prevent fraud upon other creditors.—IN RE NOVAK, U. S. D. C., N. D. (Iowa), 101 Fed. Rep. 800.

13. BANKRUPTCY—Requiring Bankrupt to Surrender Property.—A court of bankruptcy has power and jurisdiction to order a bankrupt to surrender to his trustee money or other property found to be in his possession or control and which constitutes assets of his estate in bankruptcy.—RIPON KNITTING WORKS V. SCHREIBER, U. S. D. C., D. (Wash.), 101 Fed. Rep. 810.

14. BANKRUPTCY—Set-Off.—Where a trustee in bankruptcy opposes the allowance of a claim filed by a creditor, based on an open account for goods sold by him to the bankrupt, on the ground that the creditor has received preferences, which he has not surrendered, in the way of payments to apply on such account, the creditor cannot set off against the trustee's demand for the surrender of such preferences the amount due for the goods sold, such a case not being one of "mutual debts or mutual credits between the estate of a bankrupt and a creditor," within the meaning of section 68a.—IN RE CHRISTENSEN, U. S. D. C., N. D. (Iowa), 101 Fed. Rep. 802.

15. BOARD OF HEALTH—Police Power.—In the exercise of the police power, the legislature may create boards of health, and invest them with the powers necessary and proper to prevent the spread of disease, and may confer upon cities authority to make regulations for the health of their communities.—HENGE HOLD V. CITY OF COVINGTON, Ky., 57 S. W. Rep. 495.

16. CARRIERS—Damage to Cattle—Notice of Damages.—Where a shipper, suing a carrier for damages resulting from failure to seasonably transport and safely deliver cattle, shows that they were delivered in a damaged condition, and after an unreasonable delay, the burden is on the carrier, if the shipment was under a special contract, to bring the injury within its exception, and to show that it was not caused by its own negligence.—HINKLE V. SOUTHERN RY. CO., N. Car., 36 S. E. Rep. 348.

17. CARRIERS—Negligence—Care Required as to Shipper Who Feeds his Stock.—A shipper of stock, who is carried on a steamboat on condition that he is to care for his stock, is entitled to the same care as other passengers; and therefore it was negligence as to such a passenger to leave a hatchway open, unlighted and unguarded, without any warning to him from the officer in charge of that part of the boat, who knew that he was passing that way in caring for his stock, and also knew the danger.—MEMPHIS & CINCINNATI PACKET CO. V. BUCKNER, Ky., 57 S. W. Rep. 482.

18. CARRIERS — Plea of Privilege.—Where two carriers, sued jointly for damages to freight, pleaded certain written contracts, by which the liability of each was limited to damages occurring on its own line, and plaintiff alleged the freight was shipped under a verbal contract with the initial carrier for a through shipment, without limitation of liability, and it did not appear that the connecting carrier had any knowledge of such contract, there could, under either contract, be no joint recovery; and hence the court had no jurisdiction over the connecting carrier whose line did not run through the county in which suit was brought.—SAN ANTONIO & A. P. RY. CO. V. BARNETT, Tex., 57 S. W. Rep. 600.

19. CARRIERS—Regulation of Charges—Rates on Interstate Commerce.—Under the decisions of the supreme court, which have conclusively determined that the interstate commerce commission has no power to fix rates for the carriage of interstate freight, a decree of a court for the enforcement of a rate so fixed by the commission is without authority; nor has the court itself the power to determine in advance what is a reasonable rate, and to enjoin the future observance of such rate, such power being legislative, and not judicial in its character.—SOUTHERN PAC. CO. V. COLORADO FUEL & IRON CO., U. S. C. C. of App., Eighth Circuit, 101 Fed. Rep. 779.

20. CARRIERS OF PASSENGERS—Carriers—Contributory Negligence.—Where a train has failed to stop at a station long enough to enable a passenger to alight in safety, it is not contributory negligence, *per se*, for the passenger to attempt to leave the train while in motion; but the question is ordinarily one of fact, to be determined by the jury from all the circumstances.—ILLINOIS CENT. R. CO. V. WHITTAKER, Ky., 57 S. W. Rep. 465.

21. CONFLICT OF LAW—Following Construction of State Statute—Insurance.—An exemption of policies of life insurance issued by corporations of other States, which stipulate that they shall be governed by the law of another State, from the operation of the Missouri statute (§ 5983) making policies non-forfeitable for default in payment of premiums, cannot be claimed by virtue of the constitution of the United States, and on the ground that it interferes with the contractual liberty of the corporation, since the State has power to compel such corporations to be subject to such statute as a condition of the right to do business in the State.—NEW YORK LIFE INS. CO. V. CRAVENS, U. S. S. C., 20 Sup. Ct. Rep. 962.

22. CONSTITUTIONAL LAW—Action Against State.—An action against a State treasurer in his official capacity, which is in effect to compel the State, through him, to perform its promise to return to taxpayers money that may be adjudged to have been taken under an illegal

assessment, is in substance an action against the State itself, within the meaning of U. S. Const. 11th Amend. —SMITH v. REEVES, U. S. S. C., 20 Sup. Ct. Rep. 919.

28. CONSTITUTIONAL LAW—Age of Consent—Validity of Statute.—The "Age of Consent Statute" (section 6524, Gen. St. 1894), which makes it criminal to carnally know and abuse a female child under the age of 16 years, is not void for uncertainty, but a valid penal enactment.—STATE v. ROLLINS, Minn., 83 N. W. Rep. 141.

24. CONTRACT—Cancellation—Drunkenness.—To avoid a contract on the ground that the obligor was drunk when he entered into it, it must be shown that he was so drunk as to have dethroned reason, memory, and judgment, and impaired his mental faculties to an extent that made him *non compos mentis*.—WELLS v. HOUSTON, Tex., 57 S. W. Rep. 584.

25. CONTRACTS—Combination in Restraint of Trade. —An agreement by a doctor not to practice his profession within 10 miles of a certain town for 10 years is not void, as against public policy, at common law.—WOLFF v. HIRSCHFELD, Tex., 57 S. W. Rep. 572.

26. CONTRACTS—Logging Contract.—The parties hereto entered into a contract whereby the plaintiff agreed to cut and haul certain logs for the defendant for a stipulated compensation per one thousand feet, the logs to be scaled by a scaler agreeable to both parties. The plaintiff was dissatisfied with the result of the scale, and the logs were rescaled by a deputy of the surveyor general, and this action was brought to recover for cutting and hauling the number of feet of logs shown by the official scale. The jury found that such rescale was made by agreement of the parties.—PORTEOUS v. COMMONWEALTH LUMBER CO., Minn., 83 N. W. Rep. 143.

27. CONTRACTS — Persons Bound.—A part owner of mining claims, whose interest was not of record, but who assented to the bonding of the same by the record owner, has no standing in equity to repudiate a conveyance of his interest by his co-owner in accordance with the terms of the bond, on the ground of a private agreement between them that such conveyance would not be made unless the purchaser also took certain other claims bonded separately; nor is it material that the purchaser had knowledge of complainant's interest, the latter being bound by the terms of the bond to which he assented.—CLINE v. JAMES, U. S. C. C., D. (Oreg.), 101 Fed. Rep. 737.

28. CORPORATIONS — Trust Fund — Dissolution.—The owner of all the stock of a corporation, who pending the determination of an action for a tort against the corporation, which subsequently results in a judgment against it, procures the corporation to convey all its assets to him in consideration of the surrender and cancellation of his stock, has not such an equity as will enable him to maintain a bill to enjoin the judgment creditor from selling on execution against the corporation the assets so conveyed, on the ground that such sale would create a cloud on the transferee's title, since such conveyance does not affect the right of the corporation's creditors to subject its assets to the payment of their claims.—MOFFAT v. SMITH, U. S. C. C. of App., Eighth Circuit, 101 Fed. Rep. 771.

29. COVENANTS—Warranty — Breach.—The plaintiff, in an action for breach of warranty of title to land, makes out a *prima facie* case when he proves that he yielded to an adverse claimant whose title was paramount to that of the defendant; and more especially is this so when it further appears that the defendant, with notice of the adverse claim, acquiesced in its superiority, advised the plaintiff so to do, and was himself a party to an agreement whereby the plaintiff was permitted to retain possession by paying to the adverse claimant a specified sum.—LOWERY v. YAWN, Ga., 36 S. E. Rep. 294.

30. CRIMINAL PRACTICE — Forgery—Indictment.—An indictment for forgery of a draft was sufficient where it recited the payee, amount, and the banks by and upon which it was drawn, and indorsements thereon, followed by a statement that the grand jurors were unable to give a more particular description thereof for the reason that such draft was in the possession of defendant.—STATE v. IMBODEN, Mo., 57 S. W. Rep. 536.

31. DEEDS — Description — Notice to Subsequent Grantee.—A description in a deed omitted the township in which the lands lay, but the deed recited that the grantor was the patentee, and the records showed that he was the patentee of lands of similar description in a certain township, and in no other. Held that, while such deed might be made good between the parties by parol evidence, yet the record of it was not notice to a subsequent grantee of the same grantor, and hence it passed no title as against such grantee.—OZARK LAND & LUMBER CO. v. FRANKS, Mo., 57 S. W. Rep. 540.

32. DEPOSITIONS — Exceptions to Interrogatories.— "No exception to a written interrogatory, on the ground that it is a leading question, shall prevail, unless it be filed with the interrogatories before the issuing of the commission."—FRANKS v. GRESS LUMBER CO., Ga., 36 S. E. Rep. 314.

33. DIVORCE—Unfounded Charge of Unchastity.—An unfounded charge by the husband of unchastity on the part of the wife does not entitle her to an absolute divorce, but is sufficient to authorize a divorce from bed and board, under Ky. St. § 2121, authorizing the court to grant a divorce from bed and board for any cause named in the statute, or for any other cause considered sufficient.—KEPAUVER v. KEPAUVER, Ky., 57 S. W. Rep. 467.

34. EASEMENTS—Non-user of Passway.—Non-user of a passway acquired by grant does not destroy the easement, in the absence of any act on the part of the owner of the servient estate which is inconsistent with the existence of the easement; and the acquiescence by the owner of the easement in temporary changes in the passway from one route to another for the convenience of the owner of the servient estate does not operate as an abandonment of the original way granted.—JOHNSON v. CLARK, Ky., 57 S. W. Rep. 474.

35. EVIDENCE—Admissions—Offer to Confess Judgment.—An offer to confess judgment, which is not accepted, cannot be treated as an admission of the cause of action or of the amount to which plaintiff is entitled, and cannot be given in evidence upon the trial. —KELLEY v. COMBS, Ky., 57 S. W. Rep. 476.

36. EVIDENCE — Confidential Communications—Consideration.—When a client makes to his attorney a communication or statement in the presence of the opposite party as to the transaction in hand, it is not confidential or privileged, and the attorney is a competent witness to testify respecting the same on the trial of a case arising out of such transaction between the administrator of the client and the other party. Parol evidence tending to show that a conveyance of land was really made in extinguishment of a debt, and that the grantor, for reasons satisfactory to himself, desired that the grantee should pay over to him, on delivery of the conveyance, the amount of money specified as the consideration, with the promise that, if this was done, he would repay said sum to the grantee, does not have the effect of varying any of the terms or conditions of the deed. Such evidence goes alone to the point as to what was the true consideration of the instrument, concerning which inquiry always can be made. The court erred in granting a nonsuit.—STONE v. MINTER, Ga., 36 S. E. Rep. 321.

37. EVIDENCE — Expert Evidence.—The rule that, where the question under examination is one of opinion, a witness not an expert is incompetent to testify to his opinion without stating the facts on which it is based, applies when an attempt is made to prove what distance a train running at a given rate of speed would "knock" a man struck by it on the track.—CENTRAL OF GEORGIA RY. CO. v. BOND, Ga., 36 S. E. Rep. 299.

38. EXECUTION—Levy.—An execution is not legally issued when what purports to be the signature of the

clerk thereto is not affixed by him or by his authority.—WILLIAMS v. MCAUTHUR, Ga., 36 S. E. Rep. 801.

39. FEDERAL COURTS—Constitutionality of Taking of Land.—A claim that property is taken without due process of law when condemned under a special statute for the abolition of grade crossings, because the act authorizes an increase in the number of tracks, and requires the city to pay part of the expense in violation of the State constitution, which prohibits donations by a city to a railroad corporation, raises a federal question for the purpose of a writ of error from the Supreme Court of the United States to a State court.—WHEELER v. NEW YORK, NEW HAVEN, & HARTFORD R. CO., U. S. S. C., 20 Sup. Ct. Rep. 949.

40. FEDERAL COURTS—Denying Credit to Statute of Other State.—A decision by a court of another State that the premium notice required by N. Y. Laws 1892, ch. 690, § 92, in order to justify a forfeiture for non-payment, is not required on the maturity of a note given for an installment of the premium, when this decision is based on the authority of a New York decision, does not deny full faith and credit to the statute so as to give jurisdiction to the Supreme Court of the United States on writ of error.—BANHOLZER v. NEW YORK LIFE INS. CO., U. S. S. C., 20 Sup. Ct. Rep. 972.

41. FEDERAL COURTS—Error to Territorial Court—Sufficiency of Indictment for Murder.—A conviction for murder, punishable with death, is a conviction for a capital crime within the meaning of the act of congress of March 3, 1891, as amended by the act of January 20, 1897, providing for writs of error to a district court from the Supreme Court of the United States, although the jury is given the power by the act of January 15, 1897, to qualify the verdict by adding the words "without capital punishment," and by reason of their exercise of that power the punishment actually imposed is imprisonment for life.—FITZPATRICK v. UNITED STATES, U. S. S. C., 20 Sup. Ct. Rep. 944.

42. FEDERAL COURTS — Federal Question—Independent Ground of Decision.—A decision by a State court holding that the rights of parties who make conflicting claims under United States patents are determined by a contract which they have made, and also that plaintiff's claim is defeated by estoppel, does not involve a federal question for review by the Supreme Court of the United States on writ of error.—PITTSBURG & LAKE ANGELINE IRON CO. v. CLEVELAND IRON MINING CO., U. S. S. C., 20 Sup. Ct. Rep. 931.

43. FRAUDULENT CONVEYANCES — Evidence—Declarations of Grantor.—The declaration of a grantor in possession of real estate that a conveyance of such property previously made was simulated, and to keep his creditors from seizing it, is competent against his grantee in an action by creditors of the grantor to set aside the conveyance as fraudulent.—COOPER v. FRIEDMAN, Tex., 57 S. W. Rep. 591.

44. FRAUDULENT CONVEYANCES—Validity as Between Parties.—An executed contract of conveyance is valid, as between the parties, although executed for the purpose of defrauding the grantor's creditors.—MCMANUS v. TARLETON, N. Car., 36 S. E. Rep. 838.

45. INDIAN DEPREDATIONS—Claims—Depredations in Mexico.—Indian depredations committed in Mexico on property of a citizen of the United States, although the property was taken by Indians in amity with the United States and brought by them into the United States, do not create any claim against the United States under the act of Congress of March 3, 1891, giving jurisdiction to the court of claims for depredations by Indians in amity with the United States.—CORRALITOS CO. v. UNITED STATES, U. S. S. C., 20 Sup. Ct. Rep. 941.

46. INJUNCTION — Discretion of Court.—While a municipality or water board may be restrained from cutting off a patron's supply of water because he will not pay excessive rates therefor, yet the issuance of a temporary injunction to effect that purpose is largely in the discretion of the trial court.—MCGREGOR v. CASE, Minn., 83 N. W. Rep. 140.

47. INSURANCE—Acceptance of Application Taken by Agent of Another Company.—Where defendant insurance company accepted an application taken by the agent of another company, and addressed to that company, it adopted the acts of the agent soliciting the insurance, so that he is to be regarded as the agent of defendant.—GERMANIA INS. CO. v. WINGFIELD, Ky., 57 S. W. Rep. 456.

48. INSURANCE—Valued Policy—Total Loss.—Under Sayles' Civ. St. art. 3089, providing that a fire insurance policy, in case of a total loss, shall be a liquidated demand against the company for the full amount of the policy, where the loss is total compliance with a clause of the policy requiring an appraisement is not necessary to recovery on the policy.—ÆTNA INS. CO. v. SHACKLETT, Tex., 57 S. W. Rep. 588.

49. INTOXICATING LIQUORS—Indictment—Variance.—Under an indictment for selling liquor to C, evidence showing that C acted merely as defendant's agent in delivering the liquor to another does not authorize a conviction.—BRASHEARS v. COMMONWEALTH, Ky., 57 S. W. Rep. 475.

50. INTOXICATING LIQUORS—Local Option—Place of Sale.—Where defendant sold liquor by sample in M county, and shipped it C. O. D. from another county to M county, where the whisky was delivered, and the money paid through a third person, to whom it was shipped pursuant to agreement, the sale took place in M county, and was in violation of the local option law of that county.—TEAL v. COMMONWEALTH, Ky., 57 S. W. Rep. 464.

51. LIBEL—Publication Tending to Injure Business.—In an action for publishing a notice wherein defendants requested their employees to refrain from associating with or trading with plaintiff, the action of the court in leaving it to the jury to determine whether or not the publication was defamatory, in connection with an instruction that the notice was capable of two constructions,—one harmless and the other defamatory,—and that the burden of showing it to be defamatory was on plaintiff, if erroneous, is in favor of defendants, since any false publication which tends to injure a person in his trade or profession, or which causes him to be shunned or avoided by his neighbors, will be presumed defamatory.—HANCHETT v. CHIATOVICH, U. S. C. C. of App., Ninth Circuit, 101 Fed. Rep. 742.

52. LIBEL AND SLANDER — Circulars Imputing Unfitness for Election.—A circular addressed to voters, requesting them to vote against a certain candidate for representative "because in the last legislature he championed measures opposed to the moral interest of the community," without stating the measures supported, is not privileged, for it is a statement of a fact libelous *per se*, and affords no opportunity to judge whether or not the statement was a proper deduction from the facts on which it was based.—EIKHOFF v. GILBERT, Mich., 83 N. W. Rep. 110.

53 LIBEL AND SLANDER—Malice.—Where a published article is libelous and untrue, and not a proper reply to articles previously published by plaintiff, which provoked its publication, the publication is actionable, irrespective of the question of malice.—SMURTHWAITE v. NEWS PUB. CO., Mich., 83 N. W. Rep. 116.

54. LIFE INSURANCE—Abandonment and Rescission of Policy after Default.—An abandonment and rescission of a contract of life insurance by mutual agreement of the parties after the insured is in default by non-payment of premiums will put an end to the contract, although a forfeiture could not have been declared, by reason of the failure of the insurer to give notices required by statute.—MUT. LIFE INS. CO. OF NEW YORK v. PHINNEY, U. S. S. C., 20 Sup. Ct. Rep. 906.

55. LIFE INSURANCE—Abandonment of Contract after Default.—A termination of a life insurance policy by mutual agreement, after default in the payment of premiums and the refusal of the insured to continue the policy, is conclusive against the insured, notwithstanding a statutory provision which precluded the

forfeiture of the policy by reason of the default, because the notices required by the statute had not been given.—MUT. LIFE INS. CO. OF NEW YORK v. SEARS, U. S. S. C., 20 Sup. Ct. Rep. 912.

56. LIFE INSURANCE — Agreement to Terminate.—An agreement to terminate a policy of life insurance, made by the insured, who is also the beneficiary, after default in the payment of premiums, will end the contract.—MUT. LIFE INS. CO. OF NEW YORK v. ALLEN, U. S. S. C., 20 Sup. Ct. Rep. 918.

57. LIFE INSURANCE—Policy Payable to Wife and Children of Insured.—The wife and children of insured, named as beneficiaries in a policy of life insurance, do not share equally, but the wife takes one-half the policy and the children the other half; the statutory rule for the distribution of the personalty of intestate being applied.—JOHNSON'S ADMR. v. JOHNSON, Ky., 57 S. W. Rep. 469.

58. LIS PENDENS — Interest in Land.—Right to maintain and operate a street railway on a street is an interest in land, within Comp. Laws, § 441, requiring the filing for record of a notice of the pendency of suit to render the filing of a bill constructive notice of the proceedings to any purchaser of real estate; so that a purchaser of the right pending suit relative thereto is not bound by the decree therein.—DETROIT CITIZENS' ST. RY. CO. v. CITY OF DETROIT, Mich., 83 N. W. Rep. 104.

59. MANDAMUS—County Boards—Erection of a Bridge. —*Mandamus* will not be granted to compel adjoining counties to erect a bridge at a particular point,—they having been given discretion to select a site,—provided they agree on a site and erect a bridge within a reasonable time.—OXBY v. BOARD OF SUPRS. OF ANTRIM CO., Mich., 83 N. W. Rep. 182.

60. MANDAMUS—Directing Court to Bring in a Party. —*Mandamus* is the proper remedy to compel a court to bring in a party to an action, when it has erroneously declined to make him a party on the ground that it has no jurisdiction to do so.—IN THE MATTER OF CONAWAY, U. S. S. C., 20 Sup. Ct. Rep. 951.

61. MANDAMUS—To Compel Obedience to Mandate.—The decision by an inferior court upon any matter left open by the mandate and opinion of a higher court can be reviewed only upon a new appeal, and not by *mandamus*.—EX PARTE UNION STEAMBOAT CO., U. S. S. C., 20 Sup. Ct. Rep. 904.

62. MARRIAGE—Rebuttable Presumption.—The presumption of a common law marriage from the conduct of the parties is a rebuttable presumption, and an instruction taking from the jury a written contract between the alleged husband and wife, in which they hold themselves out as unmarried, and practically making the presumption conclusive, is error.—ADAIR v. METTE, Mo., 57 S. W. Rep. 551.

63. MASTER AND SERVANT — Negligence—Assumption of Risk.—Action for personal injuries, in which it is held that the trial court correctly directed judgment for the defendant notwithstanding the verdict, for the reason that the evidence failed to establish negligence on the part of the defendant, but did show that the plaintiff assumed the risks incident to the work in which he was engaged when injured.—KLETSCHKA v. MINNEAPOLIS & ST. L. R. CO., Minn., 83 N. W. Rep. 183.

64. MINES AND MINING — Mine Explosion—Erroneous Instructions.—Instructions as to the duty of a mine owner with respect to ventilation of the mine and keeping it clear from standing gas are erroneous, when they are so inconsistent with other instructions that they tend to confusion and misapprehension, and when they make his duty relative instead of absolute, as required by the act of Congress of March 3, 1891, making the test what a reasonable person would do, instead of the command of the statute.—DESERANT v. CERILLOS COAL R. CO., U. S. S. C., 20 Sup. Ct. Rep. 967.

65. MUNICIPAL CORPORATION — Contract—Mistake in Bid.—A mistake in the proposals by a bidder for a contract with a city, which is promptly declared by an agent of the bidder as soon as it is discovered and before the city has done anything to alter its condition, will not bind the bidder by reason of a provision in the city charter that a bid shall not be withdrawn or canceled until the board shall have let the contract.—MOFFETT, HODGKINS, & CLARKE CO. v. CITY OF ROCHESTER, U. S. S. C., 20 Sup. Ct. Rep. 957.

66. MUNICIPAL CORPORATIONS — Contracts for Water. —The waterworks act (How. Ann. St. ch. 84), providing by section 12 that a city in which a company is formed for supplying it and its inhabitants with water may contract with it for the supply of water for municipal purposes, and for the time and mode of payment, and by section 15 that on the organization of any such company the common council shall by ordinance grant to it the right to use the streets, and in such ordinance may prescribe reasonable terms in reference to the charging of tolls for the water to be furnished by the company to the city and its inhabitants, is not repealed by the charter of a city, subsequently enacted, providing that the amount which the city may raise by general tax for defraying general expenses, and all purposes other than school purposes, shall not exceed 1 per cent. in any year; but, on the city availing itself of the provisions of the waterworks act, it stands a part of its charter, as a separate chapter, dealing with the specific subject of a water supply.—MENOMINEE WATER CO. v. CITY OF MENOMINEE, Mich , 83 N. W. Rep. 127.

67. MUNICIPAL CORPORATIONS—Liability for Negligence of Firemen.—A city is not liable for an injury to a stock of goods by water, resulting from the negligence of its firemen in attempting to extinguish a fire. —DAVIS v. CITY OF LEBANON, Ky., 57 S. W. Rep. 471.

68. MUNICIPAL CORPORATIONS—Liability for Unlawful Arrest by Police Officers.—A city is not liable for the tort of its police officers in making an unlawful arrest. —BEAN v. CITY OF MIDDLESBORO, Ky., 57 S. W. Rep. 478.

69. MUNICIPAL CORPORATIONS—Officers—Increase of Power by Legislature.—The legislature has no power to confer on a previously appointed city water board authority which it did not previously have to impose on abutting property, either directly or indirectly, through the city council, the cost of pipes which it might lay.—COOK FARM CO. v. CITY OF DETROIT, Mich., 83 N. W. Rep. 180.

70. MUNICIPAL CORPORATIONS — Ordinance — Scavengers.—A city ordinance providing that all scavenger work of the city shall be done by licensed scavengers, fixing the time when closets must be cleaned and the charges for cleaning them, and giving the board of health power to decide who are competent bidders for this work, is in derogation of common right, and, in the absence of a showing that it is reasonably necessary and just, must be held invalid so far as it applies to a defendant prosecuted under it for cleaning a closet without a license as a scavenger.—STATE v. HILL, N. Car., 36 S. E. Rep. 326.

71. MUNICIPAL CORPORATION — Street Paving—Frontage Rule.—An act authorizing assessment of costs of paving streets on abutting property according to frontage is not an arbitrary exaction, and does not violate Const. U. S. Amend. 14.—CASS FARM CO. v. CITY OF DETROIT, Mich., 83 N. W. Rep. 106.

72. MUTUAL BENEFIT ASSOCIATIONS — Increase of Assessments.—Where assessments in a mutual insurance association are to be on the entire membership, and proportioned among the members according to the age of each, the association, after receiving large sums in assessments from a member, cannot, without his consent, so alter the contract as to place him in a class of members whom it requires to pay on the basis of the age attained by each at the date of the assessment, while other members continue to be assessed as of their age at entry.—STRAUSS v. MUT. RESERVE FUND LIFE ASSN., N. Car., 36 S. E. Rep. 352.

73. NATIONAL BANKS—Attachment of, as Garnishee. —An attachment against a national bank as garnishee

is not an attachment against the bank or its property nor a suit against it, within the meaning of U. S. Rev. Stat. § 5242, prohibiting suit against such bank in a State court, with a view to acquiring a preference over other creditors, after insolvency or in contemplation thereof.—EARLE V. COMMONWEALTH OF PENNSYLVANIA, U. S. S. C., 20 Sup. Ct. Rep. 915.

74. NATIONAL BANKS—Offenses by Officers—Evidence.—Evidence to the effect that when a bank rediscounts notes it indorses them, and that a bank held certain notes which it rediscounted, is sufficient to establish the fact, when such notes have become lost or destroyed, that they were indorsed by the bank, and to render admissible testimony of false entries in the books of the bank respecting such notes, made by direction of a defendant charged with having, as cashier, caused such entries to be made for the purpose of concealing the liability of the bank on account of such indorsement.—DORSEY V. UNITED STATES, U. S. C. C. of App., Eighth Circuit, 101 Fed. Rep. 746.

75. NEW TRIAL—Defective Motion—Waiver.—Assuming, for the purposes of this appeal, that when making a motion to set aside a verdict in defendant's favor and for a new trial on the ground of misconduct of two jurors, as shown by their own affidavits, the motion was irregular and defective without a settled case or bill of exceptions, it is held that defendant's counsel waived the irregularity or defect by appearing at the hearing of the motion, presenting counter affidavits, and by arguing and submitting the matter without suggesting any omission or defect.—TWADDLE V. MENDENHALL, Minn., 88 N. W. Rep. 135.

76. NEW TRIAL—Granting on Condition.—Under Rev. St. art. 1370, providing that new trials may be granted on such terms and conditions as the court shall direct, and article 1374, declaring that all motions for new trials shall be determined at the term at which they are made, the court may grant a new trial on condition of the payment of all costs before the adjournment of the term.—TOWN V. GUERGUIN, Tex., 57 S. W. Rep. 565.

77. OFFICE AND OFFICERS—Constitutional Questions—Right to Office.—A decision by State tribunals against a claimant to the office of governor does not deprive him of any right to property within the meaning of U. S. Const. 14th Amend., so as to give jurisdiction to the Supreme Court of the United States on writ of error.—TAYLOR V. BECKHAM, U. S. S. C., 20 Sup. Ct. Rep. 890.

78. PAYMENT — Satisfaction — Conclusiveness.—The rule that payment of a less sum in satisfaction of a larger sum is not binding for want of consideration only applies when the larger sum is liquidated, and when there is no consideration whatever for the surrender of a part of it, and the rule itself is considered so far with disfavor as to be confined strictly to cases within it.—CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY V. CLARK, U. S. S. C., 20 Sup. Ct. Rep. 924.

79. PLEADING—Answer.—When a petition in one paragraph alleges that the defendant "is indebted" to the plaintiff "upon an open account," setting forth a copy thereof, and in another paragraph alleges that, although the account is past due, the defendant refuses to pay the same, an answer which in terms specifically denies all the allegations in these paragraphs is good, and ought not to be stricken on demurrer.—DE SOTO PLANTATION CO. V. HAMMETT, Ga., 36 S. E. Rep. 304.

80. PLEDGES—Sale by Pledgor to Pledgee.—Where the pledgee of shares of stock surrendered to the pledgor a paper evidencing the pledge, and also surrendered the notes to secure which the pledge was made, marking them "paid," and the pledgor executed and delivered to the pledgee an absolute bill of sale of the shares, the chancellor will not, in the absence of strong evidence of fraud, set aside the contract and permit the pledgor to redeem.—CUNNINGHAM V. JONES' EXRS., Ky., 57 S. W. Rep. 488.

81. PRESCRIPTION—Persons Not Sui Juris.—Where a city, by erecting a dam across a river, destroyed a road leading across such river, one who claimed a prescriptive right to the use of the road, which was never condemned or donated by the owners of the land through which it passed, was bound to show that the owners of such lands had been *sui juris* during the prescriptive period, as such right could not have been acquired by adverse use as against persons under legal disability.—CITY OF AUSTIN V. HALL, Tex., 57 S. W. Rep. 563.

82. PRINCIPAL AND AGENT—Sales by Traveling Salesman.—Whether or not the rule that an order given to a traveling salesmen for goods is a mere proposal, to be accepted or not as the principal may see fit, applies where the purchaser is not put on notice that the authority of the agent is limited to taking orders subject to the principal's approval, it should be applied where a traveling salesman proposed to sell to a customer $860 worth of nails, on a credit, for $382.50, as such a transaction was not within the scope of the apparent authority of the agent, and the customer must have known that he was either joking, or perpetrating a fraud on his principal.—CHARLES BROWN GROCERY CO. V. BECKETT, Ky., 57 S. W. Rep. 458.

83. PUBLIC LANDS—Grant to State.—Act Cong. Oct. 1, 1890, granted lands to the State to be used as a permanent camp and parade ground, and for such other purposes, in connection with the training and education of the militia, as the legislature may direct, the lands to revert to the United States when the State shall cease to use them for such purposes. Held that, in the absence of legislative provision, such lands are in the care and control of the governor, as commander in chief of the military force of the State.—IN RE OPINION OF JUDGES, S. Dak., 88 N. W. Rep. 96.

84. PUBLIC LANDS — Pre-emption — Preference Obtained by Settlement.—The preference which a settlement on unsurveyed public lands gives under the pre-emption law is effective against subsequent claimants only when the settler files his declaratory statement within the prescribed three months after the receipt at the land office of the plat of survey.—OSBORNE V. ALTSCHOUL, U. S. C. C., D. (Oreg.), 101 Fed. Rep. 739.

85. RAILROADS—Right of Way—Abandonment.—The abandonment by a railroad company of a right of way acquired by deed is a question of intent, and, while such intent may be found as a fact from long non-use, the non-user itself does not constitute abandonment, nor operate to defeat or impair the right to the easement.—TOWNSEND V. MICHIGAN CENT. R. CO., U. S. C. C. of App., Sixth Circuit, 101 Fed. Rep. 757.

86. RAILROAD COMPANY—Construction in Street—Injunction.—Where a railroad was constructed in a street under legislative and municipal authority, though the entire width of the street was used so as to interfere with its use for the passage of persons or vehicles, the right of an abutting property owner to enjoin the railroad company from using so much of the street as may be necessary for the passage of vehicles accrued when the road was put in operation, if injunction was the proper remedy, and the right was barred after the lapse of five years from that time, under Ky. St. § 2515, providing that "any action for trespass on real or personal property, or any injury to the rights of plaintiff, not arising on contract, shall be commenced within the five years next after the cause of action accrued."—FERGUSON V. COVINGTON & C. EL. RAILROAD & TRANSFER & BRIDGE CO., Ky., 57 S. W. Rep. 460.

87. RAILROAD COMPANY—Fences—Injury to Crops.—Where plaintiff's crop was injured by intrusions of stock at divers times between June 1 and December 1, 1896, by reason of defendant's failure to maintain a fence along its railroad, as required by Rev. St. 1889, § 2611, during said period, it was not error to permit a recovery of the whole damage in one count.—DARBY V. MISSOURI, K. & T. RY. CO., Mo., 57 S. W. Rep. 550.

88. RAILROAD COMPANY—Street Railroads—Injury to Abutting Property.—Under Const. § 242, providing that

"municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken injured, or destroyed by them," plaintiff is entitled to recover of defendant street railroad company for substantial injury to her property arising from the construction and operation of defendant's tracks and turntable in a street near the front of plaintiff's property, to the extent that the injury was caused by such noises, smells, and disturbances as are not fairly incidental to the usual operation of such a street railway, and are not suffered by the property owners generally along the line; but the court should have told the jury that plaintiff must submit, without compensation, to all those noises, smells, and disturbances that are usual in city life, and reasonably incidental to the operation of a street railway, and borne by the public generally.—LOUISVILLE RY. CO. v. FOSTER, Ky., 57 S. W. Rep. 480.

89. RAILROAD COMPANY — Trespassers — Removal.—Where the evidence showed that a trespasser on a train was assaulted by the conductor while getting off the car, and there was no evidence of burglarious intention, it was not error to instruct that, though plaintiff was on the car without right, and attempting to break into it, yet if the conductor used more force than was necessary to eject him, and keep him from breaking into such car, then defendant was liable for the damages sustained.—SOUTHERN PAC. CO. v. BENDER, Tex., 57 S. W. Rep. 574.

90. RAILROAD CORPORATION—Organization.—The issuance by the secretary of state of a certificate of incorporation to those who had purchased at judicial sale the property and franchises of a railroad company does not, *ipso facto*, create a corporation authorized to operate the railroad and exercise the franchises of that company. Such a corporation does not come into complete existence until after organization under the certificate in the manner prescribed by law.—WATSON v. ALBANY & N. RY. CO., Ga., 36 S. E. Rep. 324.

91. REAL ESTATE AGENTS—Double Commissions.—One who employs a broker to find a customer to exchange real estate with him has the right to assume that he is acting solely in his interest, and is not to receive a commission from the customer.—HANNAN v. PRENTIS, Mich., 83 N. W. Rep. 102.

92. RES JUDICATA — Certiorari.—If in rendering its judgment upon a demurrer to a petition, the court does not decide upon the merits of the case, a judgment sustaining the demurrer and dismissing the action is not a bar to another proceeding for the same cause.—PAPWORTH v. CITY OF FITZGERALD, Ga., 36 S. E. Rep. 311.

93. RES JUDICATA—Tax Deeds.—Where one who obtained a tax deed filed a bill against J and others to settle title to the land, in which suit the regularity of the tax proceedings and the validity of said deed were directly involved, the decree for complainant therein is conclusive in *mandamus* proceedings by the devisee of J to compel the auditor general to cancel said deed.—HANCHETTE v. AUDITOR GENERAL, Mich., 83 N. W. Rep. 166.

94. SALE BY SAMPLE—Warranty.—A sale of goods by sample carriers an implied warranty that the bulk of the goods purchased will correspond with the sample, but, in order to constitute such a sale, something more must appear than that at the time of the sale a sample was exhibited, viz., that when the exhibition was made it was mutually understood and intended that the sample was a reliable representative of the bulk of the goods purchased.—IMPERIAL PORTRAIT CO. v. BRYAN, Ga., 36 S. E. Rep. 291.

95. TAXATION — Property Used for Charitable Purposes—Exemption.—A Masonic lodge building, the first two stories of which were rented, and the third used as a lodge hall, was not within Const. art. 10, § 6, and Rev. St. 1889, § 7504, exempting buildings in cities and towns from taxation when used exclusively for purposes purely charitable, notwithstanding the rents received went to pay a debt on the building.—FITTERER v. CRAWFORD, Mo., 57 S. W. Rep. 532.

96. TAX SALE—Record Owners.—Respondents claimed title to certain property under a purchase at a tax sale. Appellants contested the validity of this sale on the ground that the suit for taxes was not brought against the record owners of the land, as required by statute. Respondents relied on a chain of title beginning with a patent from the United States in 1845, and showing regular conveyances to the date of the tax sale. Appellants claimed under a deed, the grantor in which appears to have been a squatter on the land, without color of title. Held that, in the absence of a showing of title by adverse possession in appellants' grantor, appellants were not the record owners of the property at the time of the tax suit, and it was not necessary that they should be parties to that suit.—KANSAS CITY & A. RY. CO. v. SMITH, Mo., 57 S. W. Rep. 555.

97. TRIAL—Direction of Verdict.—A court may properly direct a verdict for defendant on the conclusion of plaintiff's evidence in an action in which the right of recovery depends upon the questions of negligence and contributory negligence, where the conclusion follows, as a matter of law, that no recovery can be had upon any view that can properly be taken of the facts the evidence tends to establish.—NEININGER v. COWAN, U. S. C. C. of App., Fourth Circuit, 101 Fed. Rep. 787.

98. VENDOR AND PURCHASER—Action by Vendor.—Where one who was the joint owner of a tract of land joins with his then wife and the other joint owner in conveying the east half thereof to another, and an abstract of the west half refers to such deed, and the recitals thereof to the effect that the property so conveyed was community property, the first deed is admissible in evidence in an action involving the title to the west half, as tending to show that the purchaser of the west half had actual notice that the person executing the deed to the east half as the wife of the grantor was not the same person as the person who executed the deed of the west half,—the names being different,—and is sufficient to put him on inquiry as to facts which investigation would have resulted in showing that the grantor's first wife's children had a claim and interest in the land.—SCRIPTURE v. COPP, Tex., 57 S. W. Rep. 603.

99. VENDOR AND PURCHASER — Exchange of Property —Representations.—In an action by A against B to rescind an exchange of lands for failure of title, the course of B's title before the exchange had been as follows: B sold to H, who failed to pay therefor, and at B's request conveyed to J. J paid nothing therefor, and the title was placed in him merely to defeat an action of B's wife for support. The land was then sold by the sheriff, as the property of B at the suit of the wife, and bid in by V. Held, that the sheriff's sale passed the title to V, and at the time of the exchange B had no title to convey.—GREEN v. VEDER, Tenn., 57 S. W. Rep. 519.

100. VENUE—Local Subject-Matter.—A suit to compel production of a paper (a title deed in which complainant has an interest) is, without regard to the location of the land, within Comp. Laws, § 434, providing that a suit in chancery shall be commenced in the circuit court for the county in which the property in dispute is situated, if the subject-matter is local.—ROBERTS v. ROBERTS, Mich., 83 N. W. Rep. 132.

101. WILLS—Revocation.—A will, expressly revoking former wills, is held effective as a revocation, although the principal bequest of the latter one is void. —DUDLEY v. GATES, Mich., 83 N. W. Rep. 97.

102. WILLS—Validity—Execution.—When a will was executed the testator and subscribing witnesses, who were present at his request, were seated at the same table. He signed it first, and passed to one of them, who signed it, and passed to the other, who also signed it. Held, that his conduct constituted a request that they should sign it.—SCHIERBAUM v. SCHEMME, Mo., 57 S. W. Rep. 526.